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THE

LAW REPORTS.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

DEWAN MANWAR ALI . . . . . PLAINTIFF; J. C.*

AND 1879

UNNODA PERSHAD ROY . . . . . DEFENDANT. *Nov.* 13, 14.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Limitation Act, IX. of 1871, *Sched.* 2, *Art.* 145—*Adverse Possession.*

According to the provisions of art. 145 of Act IX. of 1871, schedule 2, the time from which the period of twelve years is to be calculated is that when the possession of the Defendant or some person through whom he claims becomes adverse to the Plaintiff.

Case in which, although the lands in suit were technically in the possession of the Defendant's predecessor, the period of limitation was *held* not to run until the Plaintiff was under some necessity or duty to assert his rights.

APPEAL by special leave from a decree of the High Court (Feb. 25, 1876), which reversed that of the Subordinate Judge of *Tipporah* (Sept. 7, 1874).

The Appellant, on the 19th of September, 1873, sued the Respondent and others to recover a twelve annas share, and to eject the Respondent from his possession of the lands in suit, on the allegation that they were mal or rent-paying lands to which he (the Appellant) was entitled, and of which his step-brother *Dewan*

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

1879

DEWAN MANWAR ALI v. UNNODA PERSHAD ROY

Sumdul Ali held possession in 1864, alleging them to be lakhiraj or rent-free lands, and claiming to be entitled to them.

The Respondent contended that the lands were purchased by him in an execution sale as belonging to *Sumdul Ali* as lakhiraj lands, and that the Appellant had no title thereto; and that, as the lands had never been held by anybody as a rent-paying part of the zemindary, the claim should be dismissed as barred by limitation.

The facts of the case are stated in the judgment of their Lordships.

The First Court held that no such tenure ever existed.

The High Court held that no such tenure had ever been asserted for twelve years before suit, and that the suit was barred by limitation.

Doyne, for the Appellant, contended that no cause of action in respect of the pretended lakhiraj tenure accrued to the Plaintiff under the decree of the 3rd of December, 1860, or at any time before the 19th of January, 1863, when that decree became final by reason of its affirmance by the High Court; if, indeed, it could be said properly to accrue before 1864, when *Nusiruddin's* heirs got possession.

Leith, Q.C., and *C. Arathoon*, contended that limitation ran from the 3rd of December, 1860.

Doyne was not called upon to reply.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The facts of this case are complicated, but when fully stated and explained they do not appear to their Lordships to present any great difficulty. The first, if not the only question, on the appeal, is whether the Plaintiff's right to sue has been barred by the *Statute of Limitation*. That was the only question decided by the High Court, and their Lordships may at once say that if that has been improperly decided they can see no ground whatever for doubting the correctness of the decision of the Lower Court, which, upon the other material issue in the suit, held that there was no

pretence for saying that the lands in dispute were not khalisha lands, that is, lands appertaining to the zemindary, but lakhiraj lands held under some title other than of the zemindars.

The facts are shortly these: The estate in question, which is a fractional part of pergunnah *Surail*, was derived from a Mahomedan lady by her husband and two sons, and was held by them in the following proportions; the Plaintiff, who was one of those sons, had a ten annas share, his father had a two annas share, and his brother, or half-brother *Sumdul*, had a four annas share. Their enjoyment of the property was, up to the year 1839, what has been termed ijmali or joint, that is, they divided the rents of each village in proportion to their above-mentioned shares in the estate. In 1839 the family arrangement, which has been called a butwara, is said to have taken place. Their Lordships see no reason to doubt that such a transaction did take place. Under it the different villages constituting the estate were divided,—the Plaintiff taking solely certain specified villages as his ten annas share, and his father and *Sumdul* taking jointly certain other villages which were allotted to them as representing a six annas share. That state of things seems to have continued, and to have been acted upon up to the year 1856. In 1856, *Sumdul* being in embarrassed circumstances, an execution issued against his four annas of the estate at the suit of one *Nusiruddin*. It should be mentioned, however, that before this, *Munsur Ali*, the father, had died in February, 1842, and that in different ways his two annas had come to be vested in the Plaintiff, so that at the time of the execution the elder brother, the Plaintiff, had a twelve annas share, and *Sumdul* only a four annas share in the zemindary. There seems to have been the usual resistance to execution on the part of *Sumdul*, and a suit was brought by *Nusiruddin*, who was execution purchaser as well as judgment creditor, in the year 1858 to enforce his rights. The first judgment in that suit was pronounced on the 3rd of December, 1860. It was a judgment of a somewhat peculiar character. *Nusiruddin* had brought the suit, not only against *Sumdul*, and certain persons in whom *Sumdul* alleged his four annas had become vested prior to the execution, but also against the present Plaintiff, the owner of the twelve annas shares; and it was decided not only that the four

J. C. 1879

DEWAN MANWAR ALI v. UNNODA PERSHAD ROY.

annas share had continued to be the property of *Sumdul* at the date of the execution, and had passed under the sale in execution, but further that the family arrangement or butwara which had been acted on so long, and had been pleaded by the Plaintiff, had not been proved against and was not binding upon *Nusiruddin*, and that he was accordingly entitled to hold the four annas share of *Sumdul*, purchased by him in ijmali enjoyment with the Plaintiff. The High Court has held that the right of the Plaintiff to assert the rights which he has asserted in this suit accrued to him at the date of this decree, and that therefore the decree having been passed in 1860 the present suit, which was instituted on the 17th of September, 1873, is out of time.

It appears that *Sumdul*, but not the Plaintiff, appealed against this decree, and that his appeal was not finally disposed of until the 19th of June, 1863. Execution was then taken out by *Nusiruddin* against *Sumdul*, but there were fresh delays, and the heirs of *Nusiruddin*, who had died in the meantime, did not obtain constructive possession of *Sumdul's* four annas until July, 1864. *Sumdul* then set up a title to hold as lakhiraj the lands in question in this suit which had formed part of the villages allotted by the butwara, as the six annas share, treating them as no part of the khalisha lands, his interest wherein had passed under the execution.

It appears to their Lordships that this, or, at all events, the date of the dismissal of the appeal, is the earliest at which it can be said that the title of the Plaintiff to the relief which he seeks in the present suit accrued. The effect of the decree in *Nusiruddin's* suit, in so far as it set aside the partition, was to give to him a right to take from the Plaintiff four annas of the rents of all the villages previously allotted to him, and to give to the Plaintiff a corresponding equity or right to have the twelve annas of the rents of the villages which had formerly belonged to *Sumdul*. It cannot, their Lordships think, be said that the Plaintiff was bound to assert this right in 1860, because, *Sumdul* having appealed against the decree, there was of course a possibility of its being reversed or altered, and of *Nusiruddin's* suit being dismissed altogether. It was therefore uncertain against whom the right to receive the twelve annas share of the villages in question was to be

asserted; nor did it follow that because the butwara or family arrangement had been declared to be of no effect as between *Nusiruddin* and the present Plaintiff, it was of no effect as between the Plaintiff and his brother who were co-Defendants in *Nusiruddin's* suit. Again, it appears that no attempt was made by *Nusiruddin* to take out execution pending the appeal, and it may fairly be supposed that by arrangement between the brothers there was an agreement that the property should continue to be enjoyed as it had been under the partition. In these circumstances it seems to their Lordships that even if technically the lands now in question remained, pending the appeal, in *Sumdul*, there was no necessity or duty lying upon the Plaintiff to assert his rights in those lands until *Nusiruddin's* heirs were put into possession, or at all events until the rights of the parties had been finally determined by the dismissal of the appeal. These considerations are alone sufficient to bring the Plaintiff's suit within the twelve years, and to dispose of this question of limitation. The provision of the Act of 1871, which seems to their Lordships to govern the case, is the 145th article of the 2nd schedule, which says that the time from which the period of twelve years is to be calculated is that when the possession of the Defendant or of some person through whom he claims became adverse to the Plaintiff. Their Lordships think, for the reasons above stated, that there was no possession adverse to the Plaintiff before 1863. A question has been raised at the Bar whether the possession adverse to the Plaintiff did not really begin when *Sumdul*, driven to his last shift and unable to resist the execution on the part of *Nusiruddin* against his zemindary interest, first set up the claim to the lands in question in this suit as lakhiraj lands held by a title other than his zemindary title, and therefore capable of being held by him although all his interest in the zemindary had passed away. There is some evidence on the part of the Plaintiff that the ijaradars of his two annas interest in those lands were then actually and forcibly dispossessed under colour of this title. It is not, however, necessary to decide this question. It is sufficient to say that their Lordships cannot concur with the High Court in thinking that the twelve years are to be calculated from the 3rd of December, 1860, or from any time previous to the year 1863.

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It has already been intimated that in their Lordships' opinion the Defendant has wholly failed to establish a title as lakhirajdir to the lands in question. Their Lordships must therefore humbly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and in lieu thereof to order that the appeal to that Court be dismissed, and the decree of the Subordinate Judge affirmed with costs.

The Appellant will also be entitled to the costs of this appeal.

Solicitors for the Appellant: *Bailey, Shaw, & Gillett.*
Solicitor for the Respondent: *T. L. Wilson.*

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ON PETITION OF F. W. QUARRY.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Practice—Special leave to Appeal.

SPECIAL leave to appeal against an order of the High Court, dated April 3, 1879, whereby the petitioner was suspended for three months from practising as a vakeel. The term of suspension had expired, and the order appeared to have been made by Judges acting regularly within their jurisdiction upon a pure question of fact.

Graham, for the Petitioner.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an appeal made to the discretionary power of the Court to grant special leave to appeal against an order of the High Court dated as long ago as the 3rd of April, 1879, whereby the Petitioner was suspended for three months from practising as a vakeel. The period of suspension has obviously expired considerably before the time at which this application is made, and that in itself forms

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

some ground why their Lordships should not accede to the application. Their Lordships, however, do not mean to go so far as to say that if the effect of the order had been to inflict upon the character of the applicant a lasting stigma, and there had been a clear miscarriage of justice shewn, the fact that the period of suspension had expired would alone have induced them to refuse this application. But it appears to their Lordships after hearing the statement at the bar, and reading the proceedings which have been filed in support of the application, that the Court below acted within its jurisdiction; that upon the complaint of Mr. *Bullock*, the Judge of the Small Cause Court, they formulated certain charges, charges which, if substantiated, would have justified their order, that a rule to shew cause was served upon the applicant, that he put in his answer, that there were affidavits filed on both sides, that the Court heard both parties, and having heard both parties made the order which is now complained of. Their Lordships think that the Court acted within its jurisdiction when they found upon the evidence that ground was made out upon which the rule should be made absolute, or rather that enough had been made out to justify them in suspending the applicant for the time for which they did suspend him from practice, and, so far as their Lordships can judge from the materials before them, they are not prepared to say that this was not a right conclusion. It would not have followed, even if their Lordships had entertained more doubt on the subject, that they would have granted an appeal against Judges acting regularly within their jurisdiction upon a pure question of fact. The application must therefore be refused.

Solicitors for the Petitioner: *Carpenter & Sons.*

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DINOMOYI DEBI . . . . . DEFENDANT;

AND

ROY LUCHMIPUT SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Limitation—Act IX. of 1871, *s.* 20—*Acknowledgment by Defendant's Agent—Evidence of Authority.*

Held, upon the evidence in this case, that an acknowledgment of the debt sued for had not been signed by an agent of the Defendant generally or specially authorized in that behalf within the meaning of Act IX. of 1871, sect. 20.

Whatever general authority such agent may once have had from the Defendant it had ceased within the knowledge of the Plaintiff at the time of the signature. Special authority in that behalf cannot be proved by secondary evidence of the contents of a letter the non-production of which is not satisfactorily accounted for.

It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist they shall be produced as being the best evidence of their own contents.

APPEAL from a decree of the High Court (Feb. 5, 1877) reversing that of the subordinate Judge of *Rungpoor* in *Bengal* (June 10, 1875).

The Respondent sued to recover from the Appellant and two co-Defendants the sum of Rs.12,402. 8*a*. with interest at 12 per cent. per annum from the 12th Assin, 1276, in respect of a balance of a deposit and floating account running over about four years, and carried on by *Ram Tarun Hazra*, her gomashta, and *Rhada Churn Banerjee*, her son-in-law, as the Appellant's authorized agents.

The facts are stated in their Lordships' judgment.

Cowie, Q.C., and *Doyne*, for the Appellant, contended that the Respondent, on whom the burden of such a proof lay, had failed to prove that *Ram Tarun Hazra* had at the date of the hat chitta, power to make an acknowledgment of debt which would bind the Appellant. Accordingly the suit was barred by limitation.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Irrespectively of that question, the Respondent had failed to prove that the amount sued for was due by the Appellant.

Leith, Q.C., and *C. Arathoon*, contended that such amount was proved to be due; and with regard to limitation, even if *Ram Tarun Hazra* was not the agent of the Appellant at the date of the acknowledgment, his authority was not determined *quoad* the Respondent until the knowledge of such determination on the part of the Respondent was shewn: see *Pole* v. *Leask* (1).

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This suit was brought by *Roy Luchmiput Sing Bahadoor*, who is a banker carrying on his business at *Rungpoor*, and having a branch bank at *Baloochur* in *Moorshedabad*, against a lady of the name of *Dinomoyi Debi Chowdhrani*, to recover a large sum of money which is claimed as being due upon the balance of a banking account. This balance represents principal due up to the 29th Assin, 1276, Rs.12,402, and interest from that date to the 22nd Assin, 1280, Rs.5548, making altogether Rs.17,950. The Plaintiff joined, as Defendant in the action, *Ram Tarun Hazra*, who was in the service of the first Defendant and whose position will be hereafter referred to, and also, as a third Defendant, *Rhada Churn Banerjee*, her son-in-law and her dewan. There seems to have been no ground whatever for joining these two persons, for they acted as agents only in the transactions which formed the subject of the action, and were in no way personally liable to the Plaintiff. They may be considered as being out of the suit. The defence made to this claim was first, a denial that the balance claimed was due, and secondly, that if that balance was at any time due the right to recover it was barred by the *Statute of Limitations*, No. 9 of 1871. It seems that *Ram Tarun Hazra* was what is called a jammanuvis, a kind of accountant in the Defendant's service; but undoubtedly he had mooktearnamahs

(1) 8 L. T. (H. L.) N. S. 645.

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or am-mooktearnamahs from the Defendant, for the lady herself, who was examined on the part of the Plaintiff, admits that they were given to him. However, they have not been produced. It is unquestionable also that *Rhada Churn* acted as dewan of the lady. It seems that she had on one or two occasions deposited considerable sums with the Plaintiff on deposit, and had also left with him on deposit valuable property in gold and silver; but on the other side moneys were drawn out from time to time on her account. A large sum of money, Rs.17,000, was drawn from the bank to pay for an estate which she purchased. The items of the banking account were disputed in the Court below, particularly with regard to that sum of Rs.17,000, and another sum of Rs.16,000, which, though it was admitted to have been taken out for the purchase of this estate, was said to have been again paid into the bank. The banking account was managed, and the sums drawn out by *Ram Tarun Hazra*, who seems to have been the principal actor in the transactions with the bank, though *Rhada Churn* interfered in them, and must have known what was the state of the account from time to time. It seems that the account began in 1272, and was finally closed, so far as regards the drawing out and paying in of money, in 1274.

Four accounts altogether have been referred to, which bear the signature of *Ram Tarun Hazra*. The period of adjusting these accounts appears to have been in the month of Assin, treated as the beginning of the commercial year. The accounts were kept both in Hindee and Bengali books. The dates spoken of in this judgment are those in the Bengali books. The last account (the third) which was adjusted—before we come to the adjustment and hat-chitta which are in question in this suit—was adjusted on the 10th Assin, 1275, which corresponds with the 25th of September, 1868. No other account was adjusted until that in question, and upon the adjustment of which the hat-chitta in dispute was said to be given in 24th Assar, 1277, corresponding with the 7th of July, 1870. Therefore this account, instead of being adjusted as in ordinary course it would have been in Assin of 1275, was not adjusted until the 24th of Assar, 1277; and it was adjusted, not at *Mahigunge*, where the former accounts had been settled, but at *Baloochur* in *Moorshedabad*. It is said that the reason of the

delay and of the settlement having taken place at *Moorshedabad*, was that there had been some altercation about the amount of interest which should be charged upon the balance due. The two Judges of the High Court, Mr. Justice *Kemp* and Mr. Justice *Ainslie*, differed in the view they took of the truth of this mode of accounting for the delay. Mr. Justice *Kemp* gave credit to the statement of the Plaintiff's witnesses who said that the cause of the delay was the dispute about the interest. Mr. Justice *Ainslie* thought that the Plaintiff's story with regard to it was a mere pretence. It is unnecessary, in their Lordships' view, to determine which of the learned Judges is right in his view of the evidence on that point. It is enough to say that this settlement was made out of the ordinary course, being made nine or ten months after the usual time for adjusting the account, and at an unusual place.

With regard to the first question, whether the balance which appears upon the accounts was at any time due from the Defendant to the Plaintiff, their Lordships, during the course of the argument, intimated that they did not find sufficient grounds for disagreeing with the judgment of the High Court upon that point. They desire to give no further expression of their opinion than to observe that the learned Judges had materials and evidence before them which they might fairly and properly consider, and their Lordships are not prepared to disagree with their judgment.

The question remains whether the debt is not barred by limitation. The last settlement of account, which was regularly made and adjusted by *Hazra*, took place on 10th Assin, 1275, nearly five years before the suit. In order therefore to take the case out of the operation of Act No. 9 of 1871 it is necessary for the Plaintiff to establish that there had been an acknowledgment either by the Defendant herself or by an agent of hers within the period of three years, which is the period of limitation applicable to the present claim. The 20th section of Act 9 enacts: "No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act unless such promise or acknowledgment is contained in some writing signed before the expiration of the prescribed period by the party to be charged therewith, or by his agent generally or especially authorized in

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this behalf." The case of the Plaintiff is, that an acknowledgment was signed by *Hazra*, and that he, at the time he signed it, was the Defendant's agent, either generally or especially authorized in that behalf. The case is put in two ways: first, that his general authority to act for the lady continued up to the time when he signed the documents to be presently referred to; and secondly, it is said that there is evidence of a special authority given to him by her to make these acknowledgments.

The account relied on is alleged to have been adjusted by *Hazra* on the 24th Assar, 1277 (the 7th of July, 1870). This account was entered in the Plaintiff's khata for the year 1275. It is extremely simple. It states the previous balance up to the 10th of Assin, 1275, Rs.11,108, and the only new item is this:—"On account of Chati game, Rs.2." Then interest is added from the 11th of Assin, 1275, to the 29th Assin, 1276, making a total of Rs.12402. 8*a*., which is the sum mentioned in the plaint. On the same day the memorandum, called the hat-chitta, stating the account in a similar manner, was signed by *Hazra*. It contains the addition, "Interest will be paid at Rs.1 per cent. per mensem."

The extent of *Hazra's* authority is not shewn by any document. The Defendant, who was called as a witness for the Plaintiff, stated that she gave am-mooktearnamahs to *Hazra;* but they have not been produced, nor is there any evidence of their contents. It was the duty of the Plaintiff, if he relied upon those am-mooktearnamahs, to produce them. It appears that one at least was registered, and the Plaintiff might have produced a copy. No effort was made to obtain the original. *Hazra* might have been served with a subpœna to produce it; and their Lordships, on the evidence before them, see no reason to suppose that *Hazra* was otherwise than favourable to the Plaintiff. If he really had authority, and if he had given these documents acting within that authority, it was his interest to establish those facts; and from his being found in communication with the Plaintiff, and also from the Plaintiff having produced documents which he could only have obtained from *Hazra*, there is reason to suppose that he was, to say the least, well disposed to the Plaintiff and to the present claim. Though the written authority has not been produced, their Lordships think enough appears upon the evidence to shew

that he had authority, at one time, to borrow money; indeed his acts in that respect were ratified by the lady herself.

Then comes the question whether the authority which he may once have had was continued down to the time (the 7th of July, 1870) when the acknowledgments in question were signed. In the absence of the am-mooktearnamahs the answer to that question must depend on other evidence.

It is proved that in Bhadro, 1276, *Hazra* left *Rungpoor* and the residence of the Defendant and went to his own home in *Moorshedabad*, and he never returned to *Rungpoor*. That was ten or eleven months before the signature of these acknowledgments. The fact that he left the Defendant's service and did not return is proved conclusively by a great number of witnesses. The Defendant herself gives this account of it: "*Hazra* having taken a month's leave, went home and never returned, and he performed no business on my behalf. After that the said *Hazra* was no longer my servant." Another witness, *Shoshodhur Chaki*, says: "In the month of Srabun or Bhadro, 1276, *Ram Tarun Hazra* went to his house at *Rampara* in *Moorshedabad*. He has not come back since then. He did not get his salary after he had gone away, nor did he perform any business." The same facts are stated by ten or twelve witnesses called on the part of the Plaintiff. Their evidence is nowhere denied or questioned, and is supported, if support were necessary, by the witnesses called on behalf of the Defendant. Whether when he first went away he was discharged or not is immaterial. In the absence of evidence to the contrary, it is certainly to be inferred from the facts stated that his service had come to an end. If so, it is clear that he would have no general authority to sign these acknowledgments on behalf of the Defendant.

Then it is said that the Plaintiff had no notice that *Hazra's* authority had been put an end to, and therefore that as far as he is concerned it must be deemed to have continued. Formal notice in cases of this sort is not required. It will be enough if the Plaintiff knew of the agent's authority having ceased. That would depend upon his knowing whether *Hazra* had quitted the Defendant's service, and that his authority was in that way revoked. Their Lordships find that *Raout Mull*, who was the

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Plaintiff's gomashta, and apparently one of the managers of the kooti at *Mahigunge*, was aware of the fact, and it is nowhere denied that the circumstances under which *Hazra* had left, and continued to be absent, were known. *Hazra* had gone to his own country in *Moorshedabad*. *Raout Mull* says that he knew he had gone there, and *Hazra* is afterwards found to be communicating with the Plaintiff upon this suit. The inference to be drawn from all the facts of the case is, that the Plaintiff or his manager must have been aware of the situation in which *Hazra* was, and that his connection with the Defendant had come to an end. If that be so, the Plaintiff's case fails, so far as it depends on *Hazra's* general authority from the Defendant to make the acknowledgments at the time at which he made them.

It is then contended that the Defendant gave a special authority to *Hazra* to make the very adjustment which constitutes the acknowledgment in question. If that had been made out, nothing of course could have been plainer than this case would have become. What is relied on to establish the special authority is a letter alleged to have been written by the Defendant herself. The evidence of it is to be found in the deposition of *Raout Mull*, and his statement is this: "Afterwards, in the year 1276, the *Hazra* went to his country in zillah *Moorshedabad*. *Dinomoyi* wrote a letter saying, 'You have calculated interest at too high a rate; for this reason the account cannot be adjusted here.' The *Hazra* is in *Moorshedabad;* he will go to the Plaintiff, and when the Plaintiff reduces the rate of interest the account will be adjusted." An inquiry in the course of the examination of this witness was made by the Defendant's counsel as to where letters were kept, and he says this:—"The letters that used to come when I was present, I used to make over to the serishtadar of the kooti. They used to remain in the kooti with the gomashta. The letters that used to come to the gomashta remained with him." And then again he says:—"The said letter was written after the karbar was closed. I do not remember the year. *Dinomoyi* wrote at the commencement of the Nagri year 1926, or Bengali year 1277, about the adjustment of the accounts in *Moorshedabad*. I do not remember whether the said letter was to the address of the Plaintiff, or of me, or of the gomashta. I do not

remember whether it contained the seal and signature of *Dinomoyi* or the signature of *Bahda Churn* in bakalum. I received the said letter through the burkundar of the Plaintiff's kooti. The said letter used to remain in the Plaintiff's serishta. I cannot say where it is now." This witness could not say where it was at the time he was speaking, for he was no longer in the service of the Plaintiff, having left it for some time. This important letter, which would be evidence of specific authority having been given by the lady to *Hazra* to adjust the accounts, was not produced, and no attempt was made to account for its non-production. The learned Judges of the High Court do not seem to have recognised the weight of the objections which arise from the non-production of this letter, and the want of any proper explanation to account for its absence. All that Mr. Justice *Kemp* says of it is this: "It is to be regretted that the Plaintiff has not been able to file the letter from the lady, the Defendant No. 1, to this firm." The learned Judge assumes in that sentence that he was not able to file it, but there is no evidence that he was unable to do so. If such a letter existed, it should have been in his serishta. If any accident had occurred to prevent its production, it might have been shewn.

Their Lordships therefore cannot agree with the Judges of the High Court in thinking that a special authority to *Hazra* to make the acknowledgments in question was sufficiently proved. It is a cardinal rule of evidence, not one of technicality, but of substance, that where written documents exist they shall be produced as being the best evidence of their own contents. Nothing is more dangerous than to allow parol evidence to be given of what they are alleged to contain when there is reason to suppose that the documents themselves exist. If a letter exists, it may contain something very different from that which the witness represents to be its contents. When an important letter is not produced, and no explanation is given for its non-production, an inference not unnaturally arises, either that the letter, if written, does not contain that which it is represented to contain, and therefore that it would not suit the purpose of the party to produce it, or that no such letter ever existed.

Their Lordships therefore think that the parol contents of this

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letter were not properly received in evidence; and they further think, independently of the technical point of its admissibility, that the evidence does not afford trustworthy proof of the contents of the supposed letter. It is to be observed that there is no evidence that the adjustment said to have been made in pursuance of it was ever communicated to the Defendant.

On these grounds their Lordships are of opinion that *Hazra's* authority, whatever it may have been, did not continue to the time when these acknowledgments were signed, and that the Plaintiff has failed to prove any special authority from the lady to *Hazra* to make them.

Their Lordships most humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of the Subordinate Judge, and to direct that the Plaintiff do pay the costs of the litigation in *India*. He must also pay the costs of this appeal.

Solicitors for the Appellants: *Watkins & Lattey.*
Solicitors for the Respondent: *Gush & Phillips.*

SIR MAHARAJAH DRIG BIJAI SINGH . DEFENDANT;

AND

GOPAL DATT PANDAY . . . . . PLAINTIFF.

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ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, OUDH.

Birt Shankallaps—Limitation—Circular Order, 1861, *ss.* 1, 24—*Act XVI. of* 1865—*Act XIII. of* 1866—*Act XXVI. of* 1866, *ss.* 1, 2.

Sects. 1 and 24 of a Circular Order of 1861, which enact in effect that if a birteeah is out of possession in 1855 his claim cannot be recognised have been treated as enactments of limitation by the authorities in *Oudh*, and to some extent by the Legislature itself; but whether rightly so or not, they have in effect been repealed by Acts XVI. of 1865 and XIII. of 1866.

The Circular Order applied to all birt tenures, including shankallaps, so far as the latter are in the nature of birts.

The effect of sects. 1 and 2 of Act XXVI. of 1866 discussed.

APPEAL from a decree of the Commissioner of *Fyzabad*, *Oudh* (March 18, 1875), which affirmed a decision of the Assistant Commissioner of *Gonda* (Dec. 21, 1874).

The question in this appeal was as to whether the Respondent had established his claim to under-proprietary right as "birt zemindar" in two villages called *Datrangawn* and *Parsa*, and half of a third village called *Lahbana*, which form part of the Appellant's talook of *Bulrampur*.

The Respondent on the 11th of November, 1870, filed his plaint against the Appellant in the Court of the Settlement Officer of *Gonda* during the progress of the regular settlement to establish his claim to under-proprietary right in all the villages of the ilaqua or estate of *Mutariza* and *Matree*, which he alleged had been granted as "birt for maintenance" to him and his predecessors in estate, and had been held by them and him for a long time down to 1258 Fusli (1850–51), when he stated that he was forcibly ejected by the Appellant.

The Settlement Circular referred to in the judgment of their Lordships was issued by the Government of *Oudh* on the 29th of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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January, 1861, and explains the meaning of the various "birt tenures;" the 26th paragraph relating to the subject of this appeal, which was described by the Respondent as "birt for maintenance" and as "birt shankallap.

Doyne, and *J. Arathoon*, for the Appellant, contended that the suit should have been dismissed as barred by the law of limitation applicable to it; that the Respondent's possession under the lease of 1256 was possession as lessee and not as birtia; that he had failed to establish any birt zemindary rights in the villages; and that the evidence shewed that whatever claim he might have had to birt rights before 1256 were surrendered and abandoned at or before his acceptance of the lease.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case the Plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a "birt zemindar," in twenty-eight villages; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the ground that inasmuch as Plaintiff did not prove that he had been in possession in 1262 and 1263 Fusli—in other words, in the year 1855, the year before the annexation of *Oudh*—his claim could not be entertained. The Commissioner of *Oudh* not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the Plaintiff was entitled to the right he claimed, which is sometimes described as a "birt shankallap" right, sometimes as a "shankallap" right (some kinds of shankallap being almost identical with that of birt, some being different from it), and an under-settlement was decreed to him. The Judicial Commissioner, in pursuance of a power which he possessed, allowed an appeal to this Board upon a point of law, which he states to be whether paragraph 5 of ruling 5 of the Financial Commissioner, which he sets out, was or was not correct. The ruling is in these terms: "In the investigation of this and all cases of the same nature it must be remembered that the exten-

sion of the term of limitation made by Act XVI. of 1865 is founded only on the agreement of the talookdars, and does not apply to tenures originating in favour. A claimant who cannot prove possession of his shankallap holding in 1262-1263 Fusli has no *locus standi* in Court." This ruling appears to be based upon a circular of 1861, which their Lordships will assume to have had at the time the force of law. The passages in that circular on which the ruling is supposed to be founded are principally these: The 1st section enacts, "Though the settlement recently concluded with the talookdars has been declared final and perpetual, subject only to revision of assessment, it has at the same time been provided that the rights of the under-proprietors, or parties holding intermediate interest in the land between the talookdar and the ryot, shall be maintained as these rights existed in 1855." Then follows sect. 24, which relates to birt tenures, and is in these terms: "Where the birteeah has lost possession there is no more to be said. We are not to restore it to him. But the Chief Commissioner is clearly of opinion that birteeahs who are found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pattahs under the talookdars, must be maintained in the full enjoyment of their rights in subordination to the talookdars." Then come other sections which illustrate the meaning of birt. Section 25 says: "The meaning of the term 'birt' is a 'cession.' It was the purchase of the proprietary rights subordinate to the talookdar on certain conditions as to payment of rent which were held to be binding, though undoubtedly often violated by superior power." Section 26 runs thus: "Instructions are also required regarding the treatment of shankallap at settlement. Some shankallap is of much the same nature as birt, and therefore will be governed by the same rules: but it differs so far from 'bai-birt' that it is a condition of the former tenure that the talookdar can redeem it at any time by repaying the purchase-money. The option of availing himself of this condition should be afforded him at settlement. Other 'shankallap,' that which is styled kooshust and is usually given to Brahmins and Pandits, is a pure maafi tenure given by the talookdar and will be treated like other rent free grants by

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talookdars." The latter words refer us back to sect. 20, which is in these terms: "Those birts conferred by favour, or 'regatte' birts, as they are styled, in contradistinction to the former, or bai-birts, are not birts in their essential characteristics, but are identical with the rent free grants made by talookdars, and therefore liable to resumption by them at regular settlement, when the Government will take its full share of the rental, as has already been explained in paragraph 14 of the maafi rules."

Their Lordships observe that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenures, and to tenures in the nature of shankallap, which are to some extent different from birt tenures, and are assumed to be held at the option of the talookdar; but their Lordships find no such distinction in the circular of 1861. The words treated as words of limitation in sect. 24 apply to all birt tenures. If a shankallap be a birt tenure they apply to it; if it be not a birt tenure they do not apply to it, and it follows that there is no term of limitation in the regulation applicable to shankallaps. But it must be assumed for the present purpose that this is a shankallap to which the term of limitation, as it is called, applies; that is to say, that it is a shankallap of the nature of a birt, which seems to be the effect of all the holdings in this case.

Sections 1 and 24 enact in effect that if a birteeah is out of possession in the year 1855, his claim cannot be recognised. They are not, in the technical sense, enactments of limitation, though their effect is in some respects the same, viz., to prevent the owner of a birt tenure being heard to support his claim; and they appear to be treated as enactments of limitation by the authorities in *Oudh*, and to some extent by the Legislature itself. We then come to a statute, No. XVI. of 1865, which is intituled, "An Act to remove doubts as to the jurisdiction of the Revenue Courts in the Province of *Oudh*." Sect. 5 is in these terms: "No suit relating to any under-tenure which shall be cognisable in any Revenue Court under this Act"—and claims of this kind come under that category—"shall be debarred from a hearing under the rules relating to the limitation of suits in force in the province of *Oudh* if the cause of action shall have arisen on or after the 13th day of February, 1814," that is, twelve years before the annex-

ation of *Oudh*, which occurred on the 13th of February, 1856. Act XIII. of 1866 followed, which is very much *in pari materiâ*. The 1st section, after re-enacting in almost the same words the provisions of the 5th section of the former Act, goes on to say, "And any suit or appeal relating to any tenure, and cognisable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits if the cause of suit shall have arisen on or after such day," that day being the 13th of February, 1844. It appears to their Lordships that whether the provision in the Circular Order referred to be considered a provision of limitation or not, it was in effect repealed by these statutes, and that the suit of a birteeah became cognisable, notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could be raised on the question of limitation, their Lordships are of opinion that these two statutes are an answer to it.

But it has been contended that the disability, which it is said the Plaintiff labours under to prove his title, is not in effect a disability under a Statute of Limitations, but a disability affecting the title itself. Act No. XXVI. of 1866 is relied upon for this purpose. It is entitled, "An Act to legalise the rules made by the Chief Commissioner of *Oudh* for the better determination of certain claims of subordinate proprietors in that Province;" and it enacts, "Whereas certain rules have been made by the Chief Commissioner of *Oudh* for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration; and whereas it is expedient that such rules shall have the force of law, it is hereby enacted as follows:—1. The rules for determining the conditions to which persons possessed of subordinate rights of property to talookas in the territory subject to the administration of the Chief Commissioner of *Oudh* shall be entitled to obtain a sub-settlement of lands, villages, or sub-divisions thereof which they held under talookdars on or before the 13th day of February, 1856, and for determining the amounts payable to the talookdars by such subordinate proprietors, which rules were made by the said Chief Commissioner, sanctioned by the Governor-General of *India* in

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Council, and published in the *Gazette of India* for September 1st, 1866, and which are published in the schedule to this Act, are hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the Plaintiff's claim. The chief reliance has been placed upon sects. 1 and 2. The 1st section is to the effect that—"The extension of the term of limitation for the hearing of claims to under-proprietary rights in land makes of itself no alteration in the principles hitherto observed in the recognition of a right to sub-settlement." Rule 2 goes on to say, "When no rights are proved to have been exercised or enjoyed by an under-proprietor during the period of limitation, beyond the possession of certain lands as seer or nankar, no sub-settlement can be made. But the claimants will be entitled, in accordance with the rules contained in the Circular Orders which have hitherto been in force in *Oudh* upon this subject, to the recognition of a proprietary right in such lands." That does not apply to this case. "To entitle the claimant to obtain a sub-settlement, he must shew that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." So far it appears to their Lordships that the finding of the Courts is in favour of the Plaintiff. He must be taken to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence was the time when he was ejected by the rajah. Then follow these words, on which reliance has been placed: "He must also shew that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favour of the talookdar, held such lands under contract (pucka) with some degree of continuousness since the village came into the talooka;" and the next section explains what is meant by "some degree of continuousness." It has been argued that inasmuch as this is a shankallap tenure of the kooshust description, and held merely by favour, and not as of right, the Plaintiff is excluded by the above words. Their Lordships are of opinion, however, that he is not so excluded; they adopt the findings of fact of the different Courts.

The claim of the Plaintiff is treated in the first place by the Settlement Officer, who originally dismissed it on the grounds which have been stated, as a claim not to "kooshust," but to "birt shankallap." The judgment of the first Court upon remand is to this effect: "I consider it proved that there were five shankallap villages held by the Plaintiff's family; that about 1256 Fusli" (it is agreed that that should stand 1258 Fusli) "they lost possession when *Jadunath* executed the conditional deed of sale. There is proof that Plaintiff held his share separately, from the Defendant's own written note on the wajibularz presented by *Jadunath;* and as the Defendant neglects to produce the deed, there is no evidence to shew that *Jadunath* did or could legally convey the rights of *Gopal Datt;* that the rajah had no right to eject him in 1256 Fusli, and he is now entitled to regain possession and to hold as an under-proprietor." That decision is confirmed by the Commissioner, Mr. *Capper.*

It appears to their Lordships that the effect of the finding is that the Plaintiff did hold, not merely in the words of the section, "through privilege granted on account of services or by favour of the talookdar," but by an under-proprietary right, which is distinguished from a holding through privilege or favour; that he was entitled to hold, not merely during the will of the talookdar, to which the latter part of the section appears to point, but *in invitum;* and their Lordships are of opinion that from the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held pucka or under contract, or at all events under an arrangement from which a contract might be inferred. That being so, their Lordships are of opinion that he is not excluded, by the words which have been read, from the right of coming before the Court and proving his case.

It has not been seriously disputed that if this be so, he has held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they will humbly advise Her Majesty that the judgment of the Commissioner be affirmed.

Solicitors for Appellant: *Young, Jackson, & Beard.*

J. C.* 1879 Dec. 4, 5, 9, 10, 11.

INDROMONI CHOWDHRANI . . . . . PLAINTIFF;

AND

BEHARI LAL MULLICK, FOR SELF AND AS GUARDIAN OF HARAN KRISHNA MULLICK } DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Law—Sudras—Adoption—Ceremonies.

Amongst Sudras in *Bengal* no ceremonies are necessary in addition to the giving and taking a child in adoption.

APPEAL from a decree of the High Court (Feb. 23, 1874), reversing the decrees of the Judge of *Moorshedabad* (Dec. 30, 1871, and Feb. 1, 1872), and dismissing the Appellant's suit with costs.

The questions upon which the judgments of the Courts below were in conflict were as to the factum and validity and effect of the adoption of the minor Defendant *Haran Krishna Mullick* by *Brojosoondari Dossee* deceased under a power from her husband. The Appellant denied the giving of such power, also he denied that *Brojosoondari* had acted thereunder, and the validity of the adoption if made.

Prior to the 23rd of February, 1874, and on the 27th of November, 1873, the Divisional Bench, before which the appeal came, referred to a Full Bench the question of law "Whether amongst Sudras in *Bengal*, any, and if any what, ceremonies are necessary to make a valid adoption? and if any ceremonies, at what time they must be performed?" This reference was stated to be in consequence of the decision in *Bhyrub Nath Sye* v. *Mahes Chundra Bhadary* (1).

The opinion of the Full Bench (*Couch*, C.J., *L. S. Jackson*, *Phear*, *Ainslie*, and *Morris*, JJ.) was as follows:—

"The question referred to us for decision is, "Whether amongst Sudras in *Bengal*, in addition to the giving and taking of the child

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 4 Beng. L. R. A. J. 162.

in adoption, any, and if any what, ceremonies are necessary to make a valid adoption; and if any ceremonies are necessary, at what time they must be performed. We are not asked to decide whether according to the received law in *Bengal*, proof of the performance of the datta-homam is essential to establish a valid adoption in a Brahmin family. It has been held by the High Court at *Madras* in *V. Singamma* v. *Vinjamuri Vemkatacharlu* (1) not to be essential; but a Division Court of this Court held in the case in 4 *Bengal* Law Reports (2) that it was.

"The *Madras* decision was not noticed either in the argument or the judgment. It not being necessary to decide this question in the appeal in which this reference is made, we do not propose to do so; and shall only consider what is the law of *Bengal* in the case of Sudras.

"We refer first to the Dattaka Mimansa. In sect. 1, the author treats of by whom adoption may be made. Having stated in verse 15 and the following verses when a woman may adopt, he says in verse 24: 'It must not be argued that since under a text of Çaunaka the employment of a priest is according to the approved doctrine the 'homa' may be completed by his intervention; for although that were completed, still would the adoption (by the woman) be imperfect, since she is not competent to perform the prayers requisite for the same.' And in verse 25 the prayers are specified. This is an assertion that notwithstanding the incompetency of a woman to perform the requisite prayers there may be a complete adoption by her, and that this is not by reason of the intervention of a priest. The Sudras being also incompetent to perform the prayers specified, the author notices their case, and in verse 26 says,—'Nor does thus the want of power of Sudras follow; for their ability (to adopt) is obtained from an indication (of law) conclusive to that effect in this passage: 'Of Sudras from amongst those of the Sudra class.' By this *Vàchaspati* is refuted, who says, 'Sudras are incompetent to affiliate a son, from their incapacity to perform the sacrament of the Homa, and prayers prescribed for adoption.'" The text of Çaunaka thus referred to is given in sect. 2, verse 74. When the author says *Vàchaspati* is refuted he plainly affirms that the incapacity of Sudras to perform

(1) 4 Madras, H. C. R. 165. (2) 4 Beng. L. R. A. J. 162.

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the 'homa' and the prescribed prayers does not make them incompetent to adopt. He then in verse 27 states in what manner the competency is produced. It treats of adoption by women and concludes, 'Therefore since by this passage (of women and Sudras without prayers) a dispensation with respect to prayers is established, the adoption (of the women in question) would be valid without prayers; like their acceptance of any chattel.'

"Thus we have it distinctly laid down that Sudras may adopt, and that an adoption by a Sudra without prayers is valid, because there is a dispensation with respect to prayers. It would be surprising if any passage from this author could be produced which would be an authority for saying that an adoption by a Sudra without the ceremonies is invalid.

"In sect. 5 the author treats of the mode of adoption. A Sudra is expressly mentioned only in verse 29 where it is said that he ought to bestow as a gratuity on the officiating priest 'the whole even of his property: if indigent to the extent of his means.' In order to make the author consistent the rules prescribed in this section must be understood as subject to the qualification that the person adopting is capable of observing them. It is not to be supposed that the author intended to contradict what he had before laid down about women and Sudras; and the concluding verse 56, 'It is therefore established that the filial relation of adopted sons is occasioned only by the proper ceremonies, of gift, acceptance, a burnt sacrifice, and so forth, should either be wanting, the filial relation even fails'—must be understood as only applying where there is a capacity to perform the ceremonies. To give any other meaning to it would make the author absolutely contradictory. In one part of his work he would be saying that a Sudra can adopt, and in another that an adoption by a Sudra is invalid because ceremonies have not been performed which he was incapable of performing, and which the author had said he was exempted from performing. The doctrine in the Dattaka Chandrika which is preferred in *Bengal* does not differ from this. On the contrary verses 29 and 32 of sect. 2 support it.

"The text of *Menu* quoted in sect. 5, verse 3, must be understood as applying to those who are capable of observing the ordained rules and not to Sudras. The decision in 4 *Bengal* Law Reports

162, A. J. which made this reference necessary is based upon a passage in the Vyavastha Darpana, 875, 2nd ed., where the author quotes as an authority for what he lays down a passage from the Dattaka Nirnaya, but it appears that the whole of the sentence is not given. After 'a Sudra also should act in like manner' are the words 'and even without the performance of homa, &c., the adoption is valid.' Thus the authority given by *Shamachurn Sircar* for his position proves to be no authority for it, but the contrary.

"The decision appears to us to be unsupported by any authority. 2 Strange, 89, may be cited as a contrary authority. The notoriety alluded to at page 170, if the practice had a modern origin, as is probable, would not be a sufficient foundation for a rule of law. We think we ought to overrule that decision and answer the question put to us by saying that amongst Sudras in *Bengal* no ceremonies are necessary in addition to the giving and taking of the child in adoption."

The same question of law was argued and decided in this appeal.

Cowie, Q.C., and *Doyne*, after contending upon the evidence that the power to adopt was not proved, that the adoption was not established *de facto*, and that no ceremonies were shewn to have been performed, argued that the absence of all ceremonies vitiated an adoption amongst Sudras in *Bengal*. The following authorities were relied upon to shew that some religious ceremonies are essential, although they fail to specify what is the essential ceremony the absence of which renders the adoption of no effect. *Menu*, ch. ix. v. 168; Dattaka Mimansa, sec. 5, vv. 4, 56: Dattaka Chandrika, sec. 2, vv. 9, 10, 11, 13, 17, 23; Vyavastha Darpana, pp. 764, 871; *Strange's* Hindu Law, vol. i. pp. 81, 82, vol. ii. pp. 218, 220; *Kiratnarain* v. *Musst Bhobinisri* (1); *Bullubakant Chowdhree* v. *Kishenprea Dassee Chowdhrain* (2); *Dayamoye Chowdhrani* v. *Rasbeharee Singh* (3); *Perkashchundra Rai* v. *Dhon Moni Dasi* (4); *Ramkishore Acharj Chowdry* v. *Bhoobunmoyee Debea Chowdhrain* (5);

(1) 1 Sel. Rep. 161.
(2) 6 Sel. Rep. 219.
(3) S. D. A. (1852), 1001, 1011.
(4) S. D. A. (1853), 96.
(5) S. D. A. (1859), 229, 237.

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Bhairab Nath Sye v. *Mohesh Chunder Bhadoory* (1); *Sutherland's* Synopsis, Head III.; *Shamlall Datta* v. *Saudamini Dasi* (2); *Sabo Bewa* v. *Nuboghun Mytee* (3); *Nittyanund Ghose* v. *Kishen Dyal Ghose* (4); *V. Singamma* v. *Vinjamuri Venkata Charlu* (5); *Sootrugun Sutputty* v. *Sabitra Dye* (6); and the Full Bench judgment given above.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This suit was brought by the Plaintiff, the widow of one *Gopal Lall Mullick*, to recover possession of property which formerly belonged to his nephew, *Gocool Chunder*, who died in November, 1841. Her case is that upon *Gocool Chunder's* death the property claimed descended to his widow *Brojosoondari*, by whom it was enjoyed during her life; that on her death, on the 3rd of April, 1868, it devolved on *Gopal Lall Mullick* as the nearest collateral heir of *Gocool;* and that *Gopal Lall Mullick*, who died on the 7th of October, 1868, devised (for it is under a testamentary gift that she claims) all his interest in it to her. She treated *Behari Lal* as the principal Defendant, and alleged that he was fraudulently holding the property under the false pretence that *Brojosoondari* had adopted his brother *Haran Krishna*, and that he is the guardian of her adopted son. The Defendants insisted upon the adoption as valid, and the question was thus reduced to one of title between the Plaintiff and *Haran Krishna*. In this state of things the principal questions which arise on the record are whether the will upon which the title of the Plaintiff depends was executed by her husband; and if so, whether her title was defeated by a valid adoption? This question of adoption of course involves the two issues, whether *Brojosoondari* had authority to adopt, and whether she had in fact exercised that authority by adopting *Haran Krishna*. To these issues of fact has been

(1) 4 Beng. L. R. 162; S. C. 13 Suth. W. R. 168.
(2) 5 Beng. L. R. 366.
(3) 11 Suth. W. R. 380.
(4) 15 Suth. W. R. 300.
(5) 4 Madras, H. C. R. 165.
(6) 2 Knapp. 287.

superadded one of law, namely, whether, supposing the adoption to have been made in fact but without certain ceremonies, those ceremonies were so essential to such an adoption that the omission to perform them invalidated that which would otherwise have been a good adoption. The lower Court found in favour of the Plaintiff that the will had been executed; it found also that the authority to adopt, which it was said *Brojosoondari* had exercised, had been given to her by her husband; but it also found that no adoption in fact by her in exercise of that power had been established, and that if it had been established it would have been invalid for want of the necessary ceremonies. The High Court abstained from dealing with the issue as to the will, obviously because if the adoption were a good adoption it would prevent any interest in the property from passing to *Gopal Lall Mullick*, and he therefore could have had none to dispose of in favour of the Plaintiff. And taking up in the first instance the issues as to the adoption, it found that the widow had authority to adopt; that she had duly exercised that authority; and having first referred to a Full Bench the question whether ceremonies were necessary and essential to an adoption in the case of Sudras, and having received from that body a certificate that they were not essential, it adopted that finding, and so disposed of the question of law. The result was a decree dismissing the Plaintiff's suit; and the present appeal is against that decree.

Before considering the question of adoption, it may be well to refer a little more particularly to some of the antecedent facts of the case. *Gocool Chunder*, as has already been said, died in November, 1841. He left him surviving, not only his widow, but *Gobind Lall Mullick*, his father. The estate in question had descended to him and a deceased brother *Brojendro Chunder Mullick* from their maternal grandfather, either directly or through their mother *Rashmoni Dossee*, it does not appear very clearly which. *Brojendro Chunder Mullick* died without children, and unmarried, and his eight annas share passed by law to his father. For several years the father-in-law and the widow appear to have gone on harmoniously. She was probably very young, her husband having died young, and the father-in-law naturally administered the whole estate. Then quarrels began between them, and *Gobind Lall*

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seems to have conceived the notion of defeating the widow's estate altogether by setting up a case that his son *Gocool Chunder* had in his lifetime adopted a cousin *Doyodronath* by name, who was one of the grandsons of *Gopal Lall Mullick*. Litigation ensued, and in the course of that litigation the widow appears to have pleaded a written authority to adopt. The case was tried before a Principal Sudder Ameen, who decided against her authority to adopt, but also decided against the case of adoption by her husband which was set up by *Gobind Lall Mullick*. The result of this decision, if it had stood, would have been to confirm *Brojosoondari* in her widow's estate, but with a negation of the genuineness of the written anumati patro which she had set up. On appeal the Sudder Court took the somewhat singular course of saying that inasmuch as the property was situated in different zillahs, and their previous leave to bring the suit in the zillah in which it was brought had not been obtained, the whole proceedings were *coram non judice* and must begin again. In that state of things *Gobind Lall Mullick*, the father-in-law, died in the month of March, 1858. Shortly after his death the solehnamah, or instrument of compromise, on which so much turns in this case, was executed between *Gopal Lall Mullick* and the widow. It contains clear admissions on the part of *Gopal Lall* that the case set up by his brother *Gobind Lall* as to the adoption of *Doyodronath* was a false case, and that the widow had an authority from her husband to adopt five sons in succession. It further contains the following provision: "And you shall take as your adopted son, in the manner prescribed by the Shastras, the son born of the womb of the wife of *Anund Mohun Mullick*, your sister's husband; that is to say, the son born of the womb of your uterine sister; but if for any cause you cannot adopt that son, you shall, by adopting successively the sons of any other person or persons of the same caste with yourself, maintain in accordance with your husband's permission the line of persons by whom offerings of water and the funeral cake are to be made to yourself and your husband, and to the pitriloka (ancestors) of both of you." This solehnamah also contained a confirmation of the gifts which *Gobind Lall* was said to have made out of the eight annas share which he inherited from his son *Brojendro Mullick*, viz., two gifts of four annas, and of

one anna to *Gopal Lall Mullick*, and a gift of the remaining three annas to *Brojosoondari* herself; and further, an agreement between the parties thenceforth to hold the estate in the proportions of eleven annas and five annas.

It appears to their Lordships impossible for the representative of *Gopal Lall*, claiming through him, to contend in the face of this document that there was no power to adopt. Two Courts, moreover, have found that there was authority to adopt, and their Lordships feel bound in this, if in any case, to adhere to their rule of not disturbing the concurrent finding of two Courts upon an issue of fact. It has however been strongly argued before them that inasmuch as the widow once set up a written authority to adopt, whereas the witnesses who now speak to the adoption seek to prove only a verbal authority to adopt, so much discredit attaches to the case for the adoption that the witnesses who depose to it are not to be believed when in conflict with those for the Plaintiff. Their Lordships do not conceive that that argument is well founded. The solehnamah, it may be observed, does not itself state whether the authority to adopt was written or verbal. It may well be that according to the course, unhappily too common, of Hindu litigation, when the widow found that her father-in-law, who was the principal witness, if the story now told is true, to the giving the verbal authority to adopt, had turned round upon her and was seeking to dispossess her by setting up a false case of an adoption by her husband, she may have been advised, and may have been foolish and wicked enough to adopt the advice, to set up a written authority to adopt which really never existed. And she may at the time when the solehnamah was executed have abandoned that case, and fallen back upon a verbal permission to adopt which was then admitted. But if this were so, her inconsistent conduct would not affect the credit of those witnesses who now speak to the verbal authority to adopt, and to the alleged exercise of it by her. Therefore their Lordships think that this argument ought not to have much weight with them in determining the credit of the witnesses who have sworn to the adoption.

The story of the adoption, as told by the Defendant's witnesses, is as follows: *Brojosoondari*, who had previously adopted one *Romesh Chowdry*, and after his death had taken some steps to

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procure in adoption a son of one *Mozoomdar*, an adoption which it is clear on the evidence was never perfected, determined to adopt *Haran Krishna*, the second son of *Anund Mohun Mullick*, being a person answering to the description in the solehnamah of the child to be taken in adoption. The child was formally given and received in adoption at *Brojosoondari's* house at *Neemteeta* in zillah *Moorshedabad* on the 20th of December, 1867, corresponding with the 6th of Pous., B. 1274; but no religious ceremonies were performed on that occasion. A few days afterwards she went to a place called *Ashtamoonissa* in zillah *Pubna*, which was the home of her father, and took up her abode with *Gourang Chunder Roy*, her nephew or cousin, taking with her *Haran Krishna*, the adopted son. Three months afterwards, in the month of Cheyt, she caused the putreshti jag ceremonies, including the datta homam or burnt sacrifice, to be celebrated under her auspices in the house of this *Gourang Chunder Roy;* and on that occasion executed a wasiutnamah in favour of *Behari Lall*, authorizing him to act as guardian of, and manager of the estate for, the adopted son during his minority. On the following day, the 31st of March, 1868, she further recognised the adoption by executing a perwannah to the ryots, declaring that she had adopted this child and that they were to pay their rent to *Behari Lall* on his account. She died at *Ashtamoonissa* a few days afterwards, on the 3rd of April, 1868, and at her obsequies, which took place there, *Haran Krishna* took the part which it is usual and proper for a son of the deceased to take. After the return of the Defendants to *Neemteeta* there was a dispute as to the fact of the adoption, and *Gopal Lall Mullick* and his faction appear to have got possession, temporarily at least, of the house of *Brojosoondari* at *Neemteeta*. It is pretty clearly established that *Gopal Lall Mullick* performed or affected to perform the sradh, which is customarily performed thirty days after the death of the deceased, at her house, whilst *Haran Krishna*, as her adopted son, was performing a rival sradh in the house of his natural father. But although *Gopal Lall Mullick* may have got temporary possession of the house, there is nothing to shew that he ever got possession of the property. There is in the Record some evidence of a threatened or apprehended disturbance, and of some persons having been bound over

to keep the peace, but there is nothing to shew how *Haran Krishna* got into possession, as he unquestionably did get into possession, or that *Gopal Lall Mullick* ever took any legal proceedings to disturb or question that possession. That is the general effect of the evidence in favour of the adoption.

On the other side there are a great many witnesses who deny altogether the fact of the adoption. Some of them, relying on the absence of the usual publicity, say that if there had been an adoption they must have known of it; that they would have been invited guests, and would have been present at the ceremony; others again attempt to prove two distinct alibis, one being directed to shew that *Brojosoondari* was not at *Neemteeta*, where the adoption is said to have taken place in the month of Pous, but had quitted it for *Ashtamoonissa* in the preceding month of Aughran or at some prior time; the other to shew that *Haran Krishna* did not accompany her, but remained in the interval between Pous and Cheyt in the house of his natural father. It may be remarked that the most respectable witness who speaks to the presence of *Haran Krishna* in the house of his natural father at one time during this period is the ploader who was examined first for the Plaintiff, and that his testimony is not absolutely inconsistent with the Defendant's case, because it is part of that case that *Haran Krishna* was not at *Ashtamoonissa* during the whole of *Brojosoondari's* residence there, but in consequence of the illness of his natural mother was sent back to his natural father's house at *Neemteeta* for a time, returning in or before Cheyt to *Ashtamoonissa*. The evidence, however, of other witnesses who speak to the fact of his continued residence at *Neemteeta* is utterly irreconcilable with the notion of his having gone with *Brojosoondari* to *Ashtamoonissa*, or indeed with his ever having been there. Therefore there is a direct conflict of evidence, and it is perfectly impossible to reconcile the two stories. The learned Judges of the High Court seem to have gone very carefully through the evidence on both sides, and their Lordships are not disposed to dissent from the conclusion to which they came, that the testimony of the witnesses on the part of the Defendant, and especially that of *Gourang Chunder Roy*, is more worthy of credit than that of the witnesses for the Plaintiff. It is not necessary for their Lord-

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ships to go in detail through the evidence on both sides. It is sufficient to say that the conclusion to which the High Court came is that to which their Lordships, after hearing the whole of the evidence read, would themselves have been disposed to come, and that they also think it is confirmed by the probabilities of the case. One of the arguments on the other side as to the improbability of the alleged adoption was founded upon the state of ill feeling which is said to have existed, and which does seem at one time to have existed, between *Brojosoondari* and *Anund Mohun*, and her sister. It is not, however, shewn that that state of feeling, if it existed at one time, continued to exist up to the time of the alleged adoption. That it once existed is a circumstance which may perhaps explain why, instead of taking *Haran Krishna* in the first instance, *Brojosoondari* adopted *Romesh Chowdry*, and afterwards shewed some disposition to adopt a second person out of the family; but it seems very difficult to reconcile the hypothesis that her hostility toward *Anund Mohund* and his wife continued up to the time of her death, with the unquestionable fact that *Anund Mohund's* son *Behari* was with her at *Ashtamoonissa*, a place distant from his and her ordinary abode, for some time before, and up to, the time of her death. The reasonable inference to be drawn from that fact is that whatever may have been the state of feeling at a previous time between *Brojosoondari* and *Anund Mohun*, his branch of the family had been restored to her favour. Another point which was much argued as throwing discredit upon the evidence for the adoption was founded on a document which the High Court has held was not properly proved in the cause, and which certainly might have been better proved if the person to whom it is said to have been addressed had been produced as a witness. This is the letter which *Anund Mohun* is said to have written on receiving the news of *Brojosoondari's* death to one *Gour Soonder Chowdry*, and in which he is supposed to speak of her having executed a gift on her death bed in favour of his son *Behari*, a gift inconsistent with the alleged adoption. Their Lordships are not prepared to say that if this letter had been better proved it might not have been explained as referring to the wasiutnamah under which *Behari* has certainly acted as guardian of the adopted son, though the document itself is lost. On the

other hand the facts already stated as to the possession of the estate by *Behari* as guardian for *Haran Krishna*, and the omission of *Gopal Lall* to take legal proceedings to obtain possession, and the perwannah to the tenants, which the High Court has found to have been executed by *Brojosoondari* in her lifetime, go far to corroborate the general truth of the oral evidence in favour of the Defendant.

Upon the whole, therefore, their Lordships are of opinion, after weighing the evidence on both sides, that they must affirm the decision of the High Court as to the fact of adoption.

The next question to be considered is the correctness of the finding of the High Court to the effect that amongst Sudras in *Bengal* no ceremonies are necessary in addition to the giving and taking the child in adoption. The strongest argument against this proposition is, of course, founded on the 56th sloka of the 5th section of the Dattaka Mimansa, which says, "It is therefore established that the filial relation of adopted sons is occasioned only by the proper ceremonies, of gift, acceptance, and burnt sacrifice, and so forth; should either be wanting, the filial relation even fails." It is admitted that whatever may be the force of the words "so forth" in the case of Brahmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the dátta homam, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brahmin priest. The authorities, however, which have been with great candour fully cited by Mr. *Cowie*, shew that it has long been questioned whether even the performance of the datta homam was essential to a valid adoption, at all events in the case of Sudras. *Jaganatha* lays down (3 Digest, 244) this broad proposition: "The oblation to fire with holy words from the Veda is an unessential part of the ceremony; even though it be defective, the adoption is nevertheless valid," and in arguing in support of this proposition he seems to make no distinction between Sudras and the superior castes. In the case before the Privy Council (1) (which it appears was a case between Brahmins), Lord *Wynford* says in his judgment, "But

(1) 2 Knapp, 287.

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although neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notice given of the times when adoptions are to take place in all families of distinction as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard with extreme suspicion the proof offered in support of an adoption." This statement of the law is perhaps of more value than it would otherwise have been, when it is considered that the case was argued on one side by Mr. Serjeant *Spankie*, who had great experience in *India* and probably was better acquainted than English counsel at that period generally were with questions of Hindu usage and law. It cannot, however, be considered as more than a dictum, since the decision was against the adoption as a fact. It was, nevertheless, in accordance with the law as then laid down by Sir *Thomas Strange* at pp. 83 and 84 of the 1st vol. of his Treatise, 1st edit., and the authorities cited by him. Then it has been more recently decided in the *Madras* High Court that even in the case of an adoption by a Brahmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the *Madras* decision is correct, and how far the ceremonies may be omitted in the case of adoption by a Brahmini woman. They may, however, observe that the reasoning of the *Madras* Court applies even *à fortiori* to Sudras. The other Indian decisions which have been cited, and particularly those of the late Suddur Dewanny Adawlut, clearly shew that the present question has long been treated as an open and vexed one by Pundits as well as Judges. It was so treated in a case before their Lordships in 1872, *Sreenarain Mitter* v. *Sreemutty Kishen Soondory Dassee* (1), but was not then decided, the suit being dismissed upon another ground. Lastly, the Full Bench in this case appears to have satisfied itself that the passage in the Dattaka Nirnaya, upon which Pundit *Shamachurn Sircar*, in his Vyavastha Darpana relies as an answer to those who deny that the performance of the datta homam is essential to an adoption by a Sudra, is in fact an authority the other way.

(1) Law Rep. Ind. Ap. (Sup. Vol.) 149.

Upon the whole, then, their Lordships have come to the conclusion that the weight of authority is in favour of the finding of the Full Bench of the High Court.

They would have been sorry to come to a different conclusion, because, although it may be true that the use of the ceremony in question on the occasion of an adoption is so general amongst Sudras that the absence of it may fairly, as Lord *Wynford* observed, cast suspicion upon a doubtful case of adoption, yet to hold that where the giving and taking of a child in adoption are established, the omission of the ceremony invalidates that adoption, would mischievously, as they conceive, strengthen the meshes of the purely ceremonial law, and tend to encourage suits to impeach *bonâ fide* adoptions. Their Lordships, agreeing with and adopting the finding of the Full Bench of the High Court, do not think it necessary to consider what would be the effect of the subsequent ceremonies performed at *Ashtamoonissa* as a remedy of any defect which up to that time may have existed in the adoption. They only observe that they have not been referred to any distinct authority that the defect may not be so supplied, particularly in cases where, as here, according to the evidence, it was from the first announced that the ceremonies usually incident to an adoption would take place at a subsequent time.

The title of the Defendant being established, their Lordships need not consider whether the will, which is an essential link in that of the Plaintiff, has been proved, and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. There will of course be no order for costs, the case having been heard *ex parte*.

Solicitors for Appellant: *Watkins & Lattey.*

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Nov. 5, 6, 7;
Dec. 13.

RAJAH VENKATA NARASIMHA APPA ROW BAHADUR . . . . . } PLAINTIFF;

AND

RAJAH NARAYYA APPA ROW BAHADUR, AND OTHERS . . . . . } DEFENDANTS.

AND BY ORDER OF REVIVOR,

RAJAH VENKATA NARASIMHA APPA ROW PLAINTIFF;

AND

THE COURT OF WARDS AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Impartible Raj—Creation of New Tenure—Construction of Sunnud—Hindu Law—Inheritance.

Prior to 1802 the zemindary in suit formed part of an ancient and much larger estate, which was indivisible and descendible to a single heir, and which, prior to the British rule, was a military jaghire held on the tenure of military service, and in the nature of a raj or principality. The whole estate was resumed by the British Government for arrears of revenue.

In 1802 the said zemindary was granted to *R.* by a sunnud the provisions of which differed in no respect from those which are contained in every ordinary deed of permanent settlement; the feudal or military tenure was at an end. The zemindary so granted became a new zemindary, subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon zemindars.

By clause 7 it was said, "You shall be at free liberty to transfer, without the previous consent of Government or of any other authority, to whomsoever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole or in any part of your zemindary."

By clause 15 it was said, "You are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns at the permanent assessment herein named the zemindary":—

Held, that, upon the true construction of the sunnud, the zemindary thereby created was not impartible or descendible otherwise than according to the ordinary rule of Hindu law.

The *Hunsapore Case* (1) distinguished; in which the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*.

APPEAL from a decree of the High Court (July 24, 1874), confirming a decree of the Civil Court of *Guntur* (August 23, 1873).

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 12 Moore's Ind. Ap. Ca. 6.

The Appellant was the original Plaintiff. He was the third son of Rajah *Shobaṇadri Appa Row*, deceased, zemindar of *Nuzvid*. The other sons were the original Defendants. Of these sons the eldest, the zemindar of *Nuzvid*, was the first Defendant. On his death the suit was revived against the Court of Wards, acting on behalf of his minor children and heirs.

The object of the Appellant's suit was to obtain a partition of the zemindary of *Nuzvid* and other property real and personal. With respect to the latter the Appellant obtained his share; but with regard to the zemindary both the lower Courts found that it was an ancient and impartible zemindary, and had so continued to be without alteration, and they dismissed his claim to a share of it.

The facts of the case are sufficiently stated in the judgment of their Lordships.

The judgments delivered in the High Court were as follows:—

Morgan, C.J.—"I gave my reasons for affirming the decree of the District Court orally at the conclusion of the argument. So far as I can now recall them, they were substantially as follows:

"Admitting, as the Appellant's counsel argued, that the Respondents were bound to shew that the ordinary rules of succession were inapplicable, I thought they had sufficiently proved that the estate in dispute is an ancient zemindary of a peculiar character, and that it is impartible.

"So far as its history can be ascertained, it was, in its origin and before the British rule, a military jaghire held on the tenure of military service.

"Though not at first strictly heritable, it ultimately became so; and from its nature the succession to the zemindary would then be, not according to the general law of inheritance, but to the rule of succession for impartible inheritances.

"The interruptions in the holding, which occurred owing to the misconduct and incapacity of some of the proprietors, did not work any alterations in the tenure, so far as its impartible character was concerned.

"At the permanent settlement in 1802, and in consequence of the prior arrangements made between the brothers, *Venkata Nara-*

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simha Appa Row and *Ramachandra Appa Row*, the zemindary became divided into two estates. It was contended that, by the acts of the parties and by the settlement transaction, the old tenure was then at an end, and that the lands included in the zemindary became two ordinary estates held under the British Government and having no peculiar incidents.

It is true that the former state of things and the ancient services were abolished for reasons of policy, and, in accordance with the previous agreement, two estates were then created in its place: but I find nothing to satisfy me that this division of the old zemindary was intended wholly to destroy its peculiar character and incident.

The mode in which the estate had been enjoyed since the settlement seems to me to support the conclusion that it is impartible.

Holloway, J.—"The only question at issue in the appeal was, whether the zemindary was divisible, or whether it was one of those to be held by an individual member.

"Encouraged by observations casually made in former proceedings, this suit has been brought, and the argument there proceeded on the ground that the impartibility must in every case be made out by evidence. It was treated as a *privilegium*. This in our opinion is not the correct view. The rule of law to be applied is dependent in every case upon the nature of the tenure, and impartibility is in certain cases as much a rule of general law as partibility in others. The question is not, whether the exception is made out, but what is the rule.

"It is beyond dispute, and has frequently been recognised by the Judicial Committee, that with respect to many zemindaries in this presidency individual holding is the rule.

"The reason of it is undoubtedly that the tenure is governed by principles not wholly derived from private law.

"Impartibility has frequently been said to attach to ancient zemindaries. If antiquity is the single test on its first aspect, the case would be concluded. This is one of the most ancient. It was held by ancestors of the present family, previously to the cession of the Circars. That the owner in unquiet times was something of a plunderer, seized all that he could, only shews, still more

forcibly, that in its inception this estate was rather a principality than mere private property.

"As history and the papers shew, he was a feudatory of the Nizam, dependent or independent according to the strength, at its extremities, of the central government. He was one of the many antitypes of the Nizam himself. His acceptance of the permanent sunnud altered in no respect the quality of his estate. It merely bound the Government, which granted it, not to exercise what with respect to tenures of this kind former Governments considered their undoubted right—the determination of the succession in each individual case. In the decision in 1818, in a suit seeking much the same relief as is now sought, the Sudder Court held that the matter was without the scope of municipal law, that the Government alone had a right to determine how and by whom the estate should be held. As a construction of the regulation of 1802, that decision is undoubtedly open to much observation; but the dismissal of the claim, undoubtedly well founded on the ordinary doctrines of Hindu law, is a decision that this estate is not held according to those doctrines. Probably, this attempt would never have been made, but for the proceedings by which, on their own petition, the Government allowed two of the brothers to take parts of the estate. It is argued that this entirely altered the quality of the parts and converted them into ordinary estates under Hindu law.

"It is difficult to see on what basis this argument rests. The natural construction of the act seems to be—We will hold one half each upon the terms on which formerly one held the whole. There is nothing to displace this natural construction; and if rules of inheritance could be varied by convention, there was certainly no agreement to make such variations.

"It is to us abundantly clear that there is not an estate in these provinces of which the original impartibility may be more safely predicated, and we are satisfied the acts which are supposed to have changed this state of things did not even profess to do so.

Innes, J.—"I agreed at the time judgment was pronounced on the ground that the evidence shewed clearly that the zemindary was an ancient impartible estate in the nature of a principality, and that what occurred subsequently between the brothers had not

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altered the character of impartibility attaching to the portions of the original estate which they then agreed to hold separately."

Cowie, Q.C., and *Grady*, for the Appellant, contended, that the effect of the sunnud of 1802 was to render the zemindary of *Nuzvid* partible and subject to the general Hindu law of inheritance. It created a new zemindary carved out of the original estate which had been resumed by the Government in 1793. There is nothing to shew that the Government intended by the grant of 1802 to preserve the original military tenure under which the ancient estate had been held. The resumption put an end to the impartibility, the regrants were never subject to that rule. No family usage was proved specially regulating the descent of the zemindary in question, and it cannot be presumed that it was granted subject to any rule of inheritance other than the ordinary one. Reference was made to the *Shivagunga Case* (1); *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (2).

Leith, Q.C., and *Mayne*, for the Respondents, contended that as the original character of the whole estate was that of a military tenure connected with a raj, impartibility was impressed upon the whole of it. The zemindary of *Nuzvid*, it must be presumed, in the absence of clear proof to the contrary, remained impartible. Impartibility does not import indivisibility; the former term means that an estate is not subject to the Hindu law of partition, although a division may be effected, as in this case, not according to that law. Here the division was by act of the ruling power, and the presumption is, that the character of impartibility is impressed upon each portion of the estate so divided. Reference was made to the *Hunsapore Case, Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (3). The intention of the Government must be taken to have been to restore the zemindary with those incidents of tenure which previously existed. In the analogous case of a settlement under Reg. XXV. of 1802, the effect would be not to alter the tenure but to fix the revenue.

Cowie, Q.C., replied.

(1) 9 Moore's Ind. Ap. Ca. 606. (2) 1 Ind. L. R. (Cal. Ser) 186.
(3) 12 Moore's Ind. Ap. Ca. 34.

Dec. 13. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment and decree of the High Court of Judicature at *Madras*, affirming a judgment and decree of the Acting District Judge of *Guntur*, in a suit in which the Appellant was the Plaintiff, and the deceased Respondent, Rajah *Narayya Appa Row*, was one, and the principal one, of the Defendants.

The suit was brought to recover, amongst other things, a sixth part or share of the zemindary of the six pergunnahs of *Nuzvid*, in the *Kondapalli* Circar, to which the Plaintiff claimed to be entitled by inheritance, as one of the six sons of Rajah *Shobhanadri*.

It was not disputed that the zemindary, prior to the year 1802, formed part of an ancient and much larger estate which was indivisible and descendible to a single heir, and that prior to the British rule it was a military jaghire held on the tenure of military service, and in the nature of a raj or principality.

It is unnecessary to trace the succession to the ancient zemindary further back than to the year 1772. It is found by the Judge of the first Court that in that year *Vankatadri*, who had succeeded to the estate, died, and was succeeded by his son *Narayya*, who was proclaimed a rebel, and made a state prisoner in 1783. The entire estate was confiscated and resumed by Government, and in the year 1784 was restored to *Venkata Narasimha*, the eldest son of *Narayya*, the rebel. It may be assumed that the estate, which was restored in its entirety, was restored as it existed prior to the confiscation, and that the rule as to impartibility and descent continued as before. See the *Hunsapore Case* (1).

Narayya, the rebel, had three sons, *Venkata Narasimha*, the eldest, to whom the estate was restored, *Ramachandra*, and *Nurasimha*.

In 1793 the estate was again resumed by Government for arrears of revenue, and in 1802 two new zemindaries were carved out of it, of which the zemindary of *Nuzvid*, now the subject of dispute, was granted to the second son *Ramachandra*, and the

(1) 12 Moore's Ind. Ap. Ca. 1.

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other, *Nidadavolu*, which was of much greater extent, to the eldest son *Venkata Narasimha*.

Upon the death of *Ramachandra* he was succeeded by his only son *Shobanadri*. In 1816 the third brother, *Nurasimha*, brought a suit against his eldest brother, the zemindar of *Nidadavolu*, and against the guardian of the minor zemindar of *Nuzvid*, in which he claimed one third of the whole property as being joint and divisible family property. He obtained a decree in his favour in the original Court. This was reversed on appeal by the Sudder Court, and his suit was dismissed. The ground of the decision was that the act of the Government in creating the two zemindaries was an act of state, and that the zemindars held by a title which the Courts could not question. No appeal was preferred against the decree of the Sudder Court, which became final. The unsuccessful Plaintiff died some time after the decree, and an arrangement was made by which the two zemindars settled an annual sum upon his family for their maintenance. This was afterwards commuted into a grant of land in full of all claims past and future. Whatever, therefore, might have been the rights of the third brother, *Nurasimha*, they have been extinguished.

On the 7th of December, 1864, the eldest of the said three brothers, the zemindar of *Nidadavolu*, died, leaving two childless widows, and a will, in which he expressed a wish that his estates should be divided equally between his widows. The Collector, in reporting the facts to the Board of Revenue, expressed his opinion that the elder wife should be recognised as successor, and that no division of the estates should be allowed, as they were of ancient origin.

Shobanadri, the second holder of the newly-created *Nuzvid* zemindary, had six sons. In 1866 his extravagance and mismanagement of the estate had caused quarrels between himself and his eldest son, *Narayya*, the principal Defendant and the original first Respondent, for the settlement of which the assistance of the Collector and the Government was invoked. In consequence of these disputes, *Shobanadri* presented a petition to Government in November, 1866, praying that orders might be issued for the division of his estate among his sons. On the 7th of January, 1867, the Government replied, referring him to the

Collector, to whom instructions had been communicated on the subject of his petition. What those instructions were does not appear. From what follows, however, it is evident, as stated by the Respondents in their case, that his request for a division was refused.

Shobanadri died on the 28th of October, 1868, leaving six sons, of whom the Plaintiff was one. The eldest, *Narayya*, was placed in possession of the zemindary by the Collector, and on the 19th of December was registered under the orders of the Board of Revenue as zemindar of *Nuzvid*.

On the 30th of November, 1868, *Venkata Narasimha*, the Plaintiff and present Appellant, petitioned Government praying for a division of the zemindary, and was informed in reply that the estate was not divisible. He repeated his application on the 26th of January, 1869, referring to the wish expressed by his father that the zemindary should be divided among his sons. To this petition the Government again replied that the zemindary cannot be divided, except under the provisions of Regulation XXV. of 1802, or in conformity with a decree of a competent Court.

On the 20th of October, 1871, the Plaintiff commenced his suit against the deceased Respondent, *Narayya*, as the principal Defendant, and joined his four other brothers as co-Defendants.

The first Defendant, *Narayya*, put in a written statement, and contended that the disputed zemindary was an ancient zemindary, and of the nature of an impartible raj. The other Defendants upheld the Plaintiff's right to a division of the zemindary, but stated that the Plaintiff had no cause of action against them.

On the 8th of July, the First Court framed, amongst others, the following issue, viz., "Whether the real property constituting the zemindary of *Nuzvid* is divisible or not," and having found that issue against the Plaintiff dismissed his suit, so far as it related to the zemindary in dispute.

The High Court, upon appeal, affirmed the decision of the first Court, whereupon the Plaintiff appealed to Her Majesty in Council against the judgment and decree of the High Court.

Pending the appeal, the first and principal Defendant, Rajah *Narayya*, who was the first Respondent, died, and by order of revivor the Court of Wards was made Respondent in his place.

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The case has been fully argued on both sides, and the only question to be considered is whether when the ancient zemindary was divided into two, the newly constituted zemindary of *Nuzvid* now in dispute was subject to the same rule as regards impartibility and inheritance as that to which the entire ancient zemindary was subject.

The sunnud under which the zemindary of *Nuzvid* was granted to *Ramachandra* is dated the 8th of December, 1802. It is directed to *Ramachandra*, describing him as the zemindar of the six pergunnahs of *Nuzvid* in the *Kondapalli* Circar, and, after reciting the benefits to be derived from a permanent settlement of the revenue, it was declared in the 2nd paragraph that the Government had resolved to grant to zemindars and other landholders and their heirs and successors a permanent property in their lands in all time to come, and to fix for ever a moderate assessment of public revenue on such lands.

By clause 4 the settlement was fixed at a certain amount. By clause 7 it was said, "You shall be at free liberty to transfer, without the previous consent of Government, or of any other authority to whomsoever you may think proper, either by sale gift or otherwise, your proprietary right in the whole or in any part of your zemindary; such transfers of your land shall be valid and recognised by the Courts and officers of Government, provided they shall not be repugnant to the Mahomedan or the Hindu laws, or to the regulations of the British Government." And, finally, after annexing to the grant certain stipulations, the 15th article declared that "continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named the zemindary of ." The name of the zemindary is not inserted, but at the end of the sunnud there was added a list headed "A list of the villages in the zemindary of the six pergunnahs of *Nuzvid*, in the *Kondapalli* Circar."

The name of the zemindary in dispute appears, therefore, to be in strictness, "The zemindary of the six pergunnahs of *Nuzvid*, in the *Kondapalli* Circar," but for convenience it is treated as the zemindary of *Nuzvid*.

The provisions of the sunnud differed in no respect from those which are contained in every ordinary deed of permanent settlement; the feudal or military tenure was at an end; the six pergunnahs to which the sunnud related became a new zemindary, subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon zemindars.

It is stated in the 11th paragraph of the written statement of the first Defendant, "that under the empire of the Mahomedans the ancient zemindary of *Nuzvid* was extensive, and was governed by its chiefs with absolute power and independence; but under the policy of the British Government the same has become divested of its military character, and dwindled into a large peiscush paying zemindary."

This is doubtless a correct statement.

In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services and under the government of a chieftain, and was in the nature of a raj or principality; but when the ancient zemindary was resumed and two new estates were created out of it, of which the zemindars ceased to be liable to military service, or to be independent chiefs, but held merely as ordinary zemindars, subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly created estates.

There was no state policy which required that the new estate of *Nuzvid* should be indivisible, otherwise clause 7 would not have been inserted in the sunnud. If *Ramachandra* had transferred by gift, sale, or otherwise any portion of his zemindary such portion would not have been impartible or descendible, according to the rule of primogeniture to a single heir of the transferree, if a Hindu or Mahomedan. Indeed it was expressly stipulated in the sunnud, that transfers in whole or in part should be valid, provided they should not be repugnant to the Hindu or Mahomedan laws, which they would have been if they had been limited to the eldest son or other single heir of a Hindu or Mahomedan transferee.

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There was no reason why the new zemindary should have been made impartible or limited to Rajah *Ramachandra* and his heirs according to the rule of primogeniture, when, so far as Government was concerned, he might have divided it by will amongst several devisees.

The limitation in paragraph 15 of the sunnud was to his heirs, by which, according to their Lordships' interpretation, his heirs according to the ordinary rule of Hindu law were intended. *Ramachandra* did not at the date of the sunnud hold an estate descendible to a single heir according to the rule of primogeniture, and there is no reason why the limitation to his heirs should be construed to mean a single heir according to the rule of primogeniture, when the descent from his transferees would be regulated by the ordinary rules of inheritance. If the Government had intended to make the estate impartible, and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantee, according to the rule of Hindu law, there is no doubt they would have expressed their intention in unambiguous language. Their Lordships have nothing to do with the case of *Venkata's* new zemindary of *Nidadavolu*, and therefore abstain from any expression of opinion as to whether it was impartible or descendible to a single heir or not. Nor are they, nor were the Civil Courts, bound by any views of the revenue authorities as to the effect or construction of the grant or the intention of the Government. Nor has the decision of the Sudder Court in *Narasimha's* case any bearing upon the construction of the sunnud of 1802, or upon the rights of the parties to the suit. In the *Hunsapore Case* (1), the zemindary was an impartible raj, which by family usage and custom descended to the oldest male heir, according to the rule of primogeniture, subject to the obligation of making babooana allowances to the junior members of the family for maintenance. It was seized and confiscated by the British Government in 1767, in consequence of the rebellion of the Rajah, who was expelled by force of arms. The Government, having kept possession until 1790, granted it in that year to a younger member of the family, on whom subsequently they conferred the title of Rajah. There was no fresh sunnud, and the

(1) 12 Moore's Ind. Ap. Ca. 1.

only question raised was, what was the nature of the estate granted; whether it was a fresh grant of the family raj with its customary rule of descent, or merely a grant of the lands formerly included in the raj, to be held as an ordinary zemindary. In that case, the estate whilst in the hands of the Government had never been broken up, and it was held that it was the intention of the Government to restore the zemindary as it existed before the confiscation, and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. There the estate was transferred in its entirety, but in this case the estate was divided into two distinct zemindaries, and a new sunnud granted allowing the same to be alienated in part or in whole, and making it inheritable by a person and his heirs and assigns for ever, that person being one who had never held an estate descendible to his eldest male heir.

The word "heirs" used in the sunnud must, in their Lordships' opinion, be construed to mean the heirs of the grantee according to the ordinary rules of inheritance of the Hindu law.

With reference to the effect of the sunnud of 1802, some reliance was attempted to be placed on an agreement said to have been entered into between *Venkata Narasimha* and his brother Rajah *Ramachandra*, dated the 17th of July, 1795, but their Lordships do not think that it was legally proved, and therefore reject it. In considering the effect of the sunnud of the 8th of December, 1802, reference may be had to the letter of Mr. *John Read*, the Collector of *Masulipatam*, to the secretary of the land revenue settlement division, dated the 25th of July, 1802, in which he submitted a plan for the division of the ancient zemindary of *Nuzvid*, and offered an opinion as to the respective claims of *Venkata Narasimha* and of *Ramachandra*, preparatory to the introduction of the permanent settlement. In that letter, of which their Lordships are of opinion that the official copy of the copy filed with the Board of Revenue (which was an official record) was under the circumstances admissible in evidence, Mr. *Read* says:—

"A perusal of the late Collector's correspondence will shew that *Ramachandra Row's* claim to participate in the zemindary

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has been long and steadily maintained, so late, indeed, as the 17th of July, 1795. The views of *Venkata Narasimha Appa Row* and *Ramachandra Row* underwent the discussion of their relatives and adherents. In consequence, an agreement was exchanged, providing for the division of the estate, effects, and zemindary of their deceased father, conformable to the usage in such cases.

"No doubt remains of the execution of this agreement, although I cannot find it received the sanction of the Collector. The elder *Appa Row* pretends to state that the document was forcibly taken, and has presented what he terms a corrected plan for the division of the zemindary. The charge of forcible exchange I believe to be incorrect, and the agreement to which *Venkata Narasimha Appa Row* appeals is no more than a loose memorandum in the handwriting of the Rajahmundry Peishkar."

But even without that letter their Lordships have no doubt whatever as to the proper construction of the sunnud of 1802, and that the zemindary thereby created for the first time was not impartible or descendible otherwise than according to the ordinary rule of the Hindu law.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgments and decrees of both the Lower Courts, and to order that the Appellant do recover one sixth part or share of the villages included in the zemindary of the six pergunnahs of *Nuzvid*, in the *Kondapalli* Circar, together with his costs in both the Lower Courts in proportion to the value of that property.

It was found by the First Court that the kamatan lands and gardens in various villages to a total value of Rs.58,500, of which a garden valued at Rs.300 is in the Plaintiff's possession, and also the forts, houses, granaries, stables, &c., valued at Rs.1,23,500, form part of the zemindary, and were therefore indivisible under the first issue, and no appeal was preferred against that finding.

Their Lordships will therefore further humbly advise Her Majesty that the said kamatan lands and gardens, forts, houses, granaries, stables, &c., above mentioned, be declared to be part of the zemindary above mentioned, and that the Appellant is entitled to recover one sixth part or share thereof, with the excep-

tion of the said garden valued at Rs.300 in the Plaintiff's possession.

Their Lordships will further recommend to Her Majesty that the amount of mesne profits from the date of dispossession of the share of the property ordered to be recovered to the date of restoration thereof be assessed in execution.

The costs of this appeal must be paid out of the estate of Rajah *Narayya Appa Row*, deceased, the original Defendant and Respondent.

Solicitors for Appellant: *Frank Richardson & Sadler.*

Solicitor for Respondent, the Court of Wards: *H. Treasure*, India Office.

BADRI PARSHAD . . . . . PLAINTIFF;

AND

BABU MURLIDHUR AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Regulation XXXIV. of 1803, *ss.* 9, 10—*Mortgagee—Accounts.*

A stipulation in a mortgage (governed by the usury laws) by which the mortgagee relieves himself from the statutory obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV. of 1803, is valid so long as it appears that such stipulation is not a device for giving to the mortgagee a higher rate of interest than that to which he is by law entitled.

APPEAL from a decree of the High Court (Nov. 24, 1876) affirming that of the Subordinate Judge of *Alighur* (Sept. 18, 1875), and dismissing the Appellant's suit with costs.

The suit was instituted by the Appellant as purchaser of the right of redemption to the extent of fifteen-sixteenths of the whole, to redeem and have a reconveyance of the right to receive that proportion of the malikana of a talook called *Gubrari*, which malikana had been mortgaged on the 16th of January, 1852, by the Respondents or their predecessors in estate to one *Seth Gopal*

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Doss, whose rights were subsequently purchased by the Respondents.

The facts appear in the judgment of their Lordships.

Doyne, for the Appellant, contended that the Respondents as mortgagees were bound by Regulation XXXIV. of 1803 to produce the accounts of their actual expenditure upon the management and collection of the mortgaged malikana: and that unless produced it was impossible to ascertain whether the stipulation for the retention by the mortgagees of the balance was not in the nature of a contract for illegal interest, a device for evading the law against usury.

Leith, Q.C., and *Witt*, for the Respondents, were not called on.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and assignees of the mortgagee's interest. The mortgage deed between the original parties was dated the 16th of January, 1852. It was a mortgage of what was called the malikana interest of certain talookdars; the amount of that malikana being, during the pendency of the then settlement, a fixed and known sum. The mortgage deed contained this stipulation: "We hereby make a written agreement that the said mortgagee having taken possession of the mortgaged villages, with all the powers enjoyed by us, may on his own authority collect the jama fixed by the Government from the villages of the Ilaka, and himself pay the revenue to the Government, instalment after instalment, according to the usage in the purgunnah; that he may bring to his own use the income of the malikana due to us, crediting every harvest Rs.1656 per year as interest on the amount of consideration on this mortgage, at the rate of 1 per cent. per mensem, and take the remainder, Rs.565, the surplus of the malikana, as his own collection fee and pay of the agent and peons employed for making collections in the villages; that is, he may credit the income of the malikana to the payment of two items—one, the interest on the mortgage amount, and the other the expenses incurred in making collections

in the villages; for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the malikana profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by Mr. *Doyne* at the Bar, is whether this agreement is sufficient to deprive the Plaintiff of his statutory right, under the 9th and 10th sections of Regulation XXXIV. of 1803, to call upon the Defendants to render the account mentioned in those two sections. A preliminary question however arises as to the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made, the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to 12 per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favour of the legal validity of the stipulation as will presently be more fully stated. It has however been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not only, point raised by the Appellant.

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Their Lordships are of opinion that this contention is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs.565 constituted a percentage which was *bonâ fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about 5¾ per cent., was certainly neither exorbitant nor unusual. Having so found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs.565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the Defendants to file accounts would be to increase the costs of suit, which must ultimately fall on the Plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

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Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for the Respondents: *Pritchard & Sons.*

NAGARDHAS SAUBHAGYADAS . . . PLAINTIFF;

AND

THE CONSERVATOR OF FORESTS AND THE SUB-COLLECTOR OF KOLABA . } DEFENDANTS.

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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Landed Tenure—Watani khoti—Izafati—Right to Timber.

In a suit to recover three-fourths share of the proceeds of certain teak and izaili timber alleged to have been cut down by the Government in the village of *P.*, the Plaintiff claiming that he had acquired his share of the village as proprietor thereof, and that the same was his waitani (hereditary) khoti and izafati (village); it appeared that the Plaintiff was the grantee of an hereditary right to receive as collector of the revenue certain perquisites out of the dues and certain cesses, and had agreed to preserve the said timber for the Government:—

Held, that the Plaintiff had no proprietary right in the soil, either as regards his izafati rights, or by virtue of his khoti, and no right to the timber.

The proprietorship of the soil is not vested in every khot.

APPEAL from a decree of the High Court (Oct. 11, 1875), reversing a decree of the Acting Judge of *Tanna* (Feb. 15, 1869), and decreeing the suit in favour of the Respondents, with costs.

The facts appear in the judgment of their Lordships.

Cowie, Q.C., and *Mayne*, for the Appellant, contended that the tenure of a khot is a proprietary right which carries with it the right to forest trees. A khot is an officer holding hereditarily the right or duty of collecting the Government revenue: *Wilson's*

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Glossary, p. 585. He is not distinguishable, as regards his rights in the soil, from a *Bengal* zemindar. If the right to forest trees is not inherent in the tenure, it was conferred upon khots by *Dunlop's* Proclamation, and has not been and could not have been cancelled by any subsequent act of the Government. As to the effect of the Government grants for the purpose of conferring title, see observations of *Westropp*, C.J., in *Krishnarav Ganesh* v. *Rangrav* (1), which shew that sunnuds are as a rule grants of all rights unless specially reserved. See also *Tajubai* v. *The Sub-Collector of Kulaba* (2), *Hunnunt Rao* v. *Sallodhur* (3), Regulation XVII. of 1827; *Govind Purshotan Kolakar* v. *The Sub-Collector and Deputy Conservator of Forests of Colaba* (4); *Dadibhai Jahangirji* v. *Ramji bin Bhau* (5); *The Kanara Land Assessment Case* (6). These rights of the khot were not abandoned by the agreement in this case made with the Government.

Scoble, Q.C., and *Raikes*, for the Respondents, contended that the Appellant had failed to establish his title to the proprietorship of the lands in which grew the timber claimed, or to the forest or timber trees therein, either under the grants or otherwise. The khot's title is admitted not to rest upon the sunnuds. The Plaintiff throughout the litigation has drawn a distinction between his khoti rights and his *izafati* rights. The izafati title does not affect the right to the soil. The izafatidar only takes the augmentation or increase. In the sunnud of 1653 there is no such person as the khot indicated. At no time did the khot hold proprietary right in the village. As to the effect of the sunnuds, see *Vaman Janardan Joshi* v. *The Collector of Thanna and the Conservator of Forests* (7). As to the khoti title, see *Tajubai* v. *The Sub-Collector of Kulaba* (8), where all the authorities are considered. Under the survey settlement the khot becomes a mere tenant, which is inconsistent with proprietary right: see *Ramchandra Narsinha Mahajan* v. *The Collector of Ratnagiri* (9). The older reports had been searched, but there was no case to be found

(1) 4 Bomb. H. C. R. A. J. 1.
(2) 3 Bomb. H. C. R. 132.
(3) Select Cas. Bomb. S. D. A. 144.
(4) 6 Bomb. H. C. R. A. J. 188.
(5) 11 Bomb. H. C. R. 162.
(6) 12 Bomb. H. C. R. App. I. 39, 40.
(7) 6 Bomb. H. C. R. 191.
(8) 3 Bomb. H. C. R. 132.
(9) 7 Bomb. H. C. R. A. J. 41.

between a khot and the Government raising the question of a khot's right as proprietor. See also *Ruttonji Edulji Shet* v. *The Collector of Thanna and the Conservator of Forests* (1).

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is a suit in which the Plaintiff claims against the Conservator of Forests in the presidency of *Bombay* and the sub-Collector of *Kolaba* in the *Tanna* zillah, a three-fourths share of the proceeds of certain teak and izaili timber which he alleges was cut down by the Government in the village of *Pigode*. His plaint states that his share in the village of *Pigode*, or *Pigoda*, was acquired by him as the proprietor thereof, and he states that it is his watani (hereditary) khoti and izafati (village). He says, "Deducting the 4 annas share which belongs to the Government of the proprietorship of the said village, the remainder of the village, namely, a 12 annas share thereof, belongs to me as proprietor. Although I have a proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood as well as izaili (inferior wood), by reason of my watani khoti and izafati thereof, the Defendants in the years 1865–66 and 1866–67 cut down teakwood and izaili wood thereof, and sold the same by auction as well as by private sale. Having (a right to take) a share of three-fourths of the proceeds of the same, I made several applications to both the Defendants, requesting to be allowed to have a three-fourths of the sale proceeds, but I obtained no redress. I sent notices also to them, but received no reply"—and so on. Then he claims three fourths of the proceeds of the timber which he alleges was so cut down by the Government. The principal question is, was he the proprietor of the soil of three fourths of the village, and as such proprietor entitled, as he alleges, to three-fourths of the jungle, including teakwood as well as izaili.

It will be necessary in the first place to consider what were his rights under the izafati title. That depends upon two sunnuds

(1) 11 Moore's Ind. Ap. Ca. 295.

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which were put in and relied upon, one dated in 1653, and the other in 1722. The sunnud of 1653 after certain recitals proceeds, "The farman is as follows: From the (beginning of the) months of the year one thousand (and) fifty-four," then there is a blank, the marginal note stating, "There is no grammatical connection whatever between the equivalent of this sentence and what follows in the original. It may probably be intended to mean that the various rights below named, appertaining to the village of *Pegoonda*, had been enjoyed by *Ismailji Abaji* from the beginning of the Arabic year 1054." The firman proceeds, "At this time *Ismailji Abaji Desai* of the tappa (district of) *Kharapat*, in the jurisdiction of the above-mentioned (town), has represented to the threshold of the universe"—that is, the Sovereign—"that the village of *Pegoonda* in the above-mentioned tappa (district) is a personal holding (khood-rawan) in lieu of isabat (dues) in this way, namely, that the fixed revenue of the above-mentioned village, consisting of ready money and corn, goes into the possession of the revenue station (thana), and some of the (taxes called) bab, and the whole of the (rights called) kanoonat relating to the above-mentioned village (assigned) for the maintenance of (his) children are his own reversionary rights (doombala khood)," —which is translated or explained in the margin to mean—"that will revert to the Sovereign on ceasing to be held by the present holder."—"And the (rights to certain perquisites called) hak-e-lawazimat and (those called) khariastotore of the above-mentioned tappa (district) are a personal holding;" then the applicant goes on to shew what were his personal holdings, and that the profits of the tobacco shop were a personal holding with a reversionary right to the Sovereign. Then he states, "It is hoped that by the royal grace, a gracious farman may be granted (to him) for the satisfaction of his mind." The farman which was granted is, "Let them (the above-named officers) recognise (the said rights as) reversionary (soombala) and continue the same;" that is to say, let them recognise all his personal rights, with reversion to the Crown, and then after him they are to continue the same rights to his children and children's children. It appears to their Lordships that the effect of this document was simply to give the grantee as the collector of the revenue certain perquisites arising

out of the dues, and to convert that right, which was then a mere personal right with reversion to the Sovereign, into an hereditary right which was to descend to his children and to his children's children. It appears therefore to their Lordships to be clear that that sunnud gave no proprietary right in the village; it did not give an interest in the soil, and it gave no right to the timber.

The next document of 1722, which was a marathi document, is a short one: "To Mashaul-anam (*i.e.*, the honourable) the Desai, the Adhikari and the Kulkarui of talooka (or taraf) *Nagothua*," and so on. "The villages which are with (*i.e.*, held by) you as izafat have been (*i.e.*, are hereby) 'settled and granted' or 'granted on certain terms being made' by *Rajishri*." Then come the names of three villages of which one is *Pigode*. "In all three villages have been (*i.e.*, are hereby) 'settled' (or granted on certain terms being made). Therefore (as to) the babatas (cesses or tolls) appertaining to the said villages, whether cesses in cash or in kind (grain), whatever the amount (thereof) may come to, (the same) shall be 'received by you' (or 'paid over to you')." All that was granted is that he was to be allowed the babatas or the cesses or tolls, he being the Desai, or the collector of the revenue on behalf of the Government. That document therefore did not convey any interest in the soil, but merely gave a certain right to certain cesses or dues as the perquisites of the grantee as the collector of the Government revenue. Therefore as regards his izafati rights they did not give him the right of proprietorship.

The next question is, was he entitled to the proprietorship of the soil of the village by reason of his *watani* or hereditary khoti. With reference to that point a report of Captain *Wingate* was read from a collection of papers by the Government of *India*, from which it appears that a khoti had the right of proprietorship; but that was merely the expression of the opinion of Captain *Wingate* at that time. Since the date of that report, however, the point came before the High Court of *Bombay* and was judicially determined. In that case—reported in the 3rd *Bombay* High Court Reports, at page 132—the Government had resumed the khoti, had granted certain rights to the sub-tenants of the estate, and were willing to allow the Plaintiff to take the khoti again upon certain conditions; namely, that she should be bound by

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the terms which the Government had entered into with the sub-tenants or holders of the land; and it was held that she was not entitled to have the khoti except upon those conditions. The reasons for the decision were that the khot was not the proprietor of the soil. The learned Judge who decided the case in the first instance went very fully into the matter, and held that the khot was merely an hereditary farmer of the revenue. The reasons are given in the report, and it will be unnecessary to read them. It is sufficient to say that that decision was opposed to the view taken by Captain *Wingate* to which reference was made from the records of the Government of *India*. Without expressing any opinion that no khot is or can be the proprietor of the soil, it is sufficient to say that it is clear that the proprietorship of the soil is not vested in every khot.

Then the question comes, was the Plaintiff in this case, by virtue of his khoti, entitled to the proprietorship of the soil and to the timber upon it.

It appears that an agreement was entered into by the Plaintiff on the 24th of December, 1861, as follows: "I give in writing this kararnama as follows: Being invested under Government Regulation (*i.e.*, Resolution), English Letter, No. 1832, dated the 18th May, 1860, received by me from the Government with (authority) to carry on the vahivat (management) from the year 1859–60 to the year 1886–87 as khoti of the fourth takshim (share) of the mauja (village) aforenamed,"—that is, including this village,—"and being also authorized (by the Government) to collect the assessment of the Government shares (also), and having consented to do so, I give in writing the (following) body of clauses relating to the management to be carried on (by me). They are written as below: The full assessment on the village aforenamed fixed at the survey is Rs.2196. 13*a*. 3*p*.; deducting therefrom the sum of Rs.1648. 5*a*. 9*p*. in respect of the Government shares, the assessment on the remaining fourth share has been fixed at Rs.548. 7*a*. 6*p*. The same I agree to pay by instalments as mentioned below,"—naming four instalments. Then by the 8th section, "The village aforenamed has been given (let) to me for twenty-eight years, from the (end of the year) 1859–60. Accordingly, for twenty-eight years from the current year 1860–61 up to the year 1886–87,

I will without any hindrance continue to the cultivating tenants or their heirs (*i.e.*, I will allow the tenants to hold) such of the khoti-nisbat lands as are entered in their names in the survey papers. The amounts of assessment on those lands have been settled at the survey." Then there are several other clauses, but the more important ones are the 15th and 16th. He says in the 15th clause, "Some land belonging to the afore-named village has been divided into numbers and reserved to itself by the Government for preserving a forest thereon. I will preserve the trees thereon. I will not allow any person to cut down the same, nor will I myself cut them down. In like manner I will not allow any person to cultivate the same, nor will I myself cultivate the same. Should any person cultivate the same, or cut down the trees thereon, I will inform Government of the same. Should the Government order that cattle may be allowed to graze on the aforesaid land reserved for a forest, I will accordingly allow cattle to graze thereon. I will not make any objection thereto. I will also preserve the teakwood trees that may be growing in this village in places other than the survey numbers aforesaid. I will not allow any one to cut them down, nor will I cut them down. If any person does cut them down, I will immediately inform the Government of the same."

Now that is an express agreement on the part of the khot that he will preserve all the trees in the Government reserves, and that he will preserve the teakwood trees that may be growing in the village in places other than the survey numbers. Can the Plaintiff in the face of that agreement, whatever his rights may have been as a khot, say, as he has said in his declaration, that he has "the proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood as well as inferior wood."

It appears to their Lordships to be clear that according to the 15th section of that agreement, all the timber in the reserves were to belong to the Government, and that the khot was not to cut down any of the teakwood, whether in the reserves or not, and that he was not to allow any other person to do so. Then in clause 16 he says: "The Government has given to me the ownership of a fourth part of all the trees that now are growing, and of all the new ones that

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may grow hereafter in the village aforenamed, excepting the trees in the aforesaid preserved forest, and those on the lands claimed by the people, and those on cultivated lands, as also excepting the teakwood and blackwood trees growing on waste lands." Therefore he admits that the Government, when they authorized him to carry on the management of one-fourth of the village, and to collect the Government revenue thereof, had the power to reserve, and that they did reserve, all the trees in allotments reserved for a forest, and all the teakwood trees in every other part of the village.

It appears to their Lordships that there is no evidence that the Government cut down any izaili wood. There is an entry which shews that some persons as trespassers went on to the Government reserves and cut down some izaili timber. A sum is credited to the forest account in respect of the proceeds of izaili (inferior kinds of) wood. The entry is: "Some people having cut wood from the Government forest at *Mauja Pigoda* without permission, and having used the same for building their own houses and cattle pens, a report was made from the Peṭa Mahalkaris, Outward No. 109 of the year 1864–65, whereupon an order was received from his Honour the Deputy Conservator of Forests, bearing Registered No. 361, dated the 16th of August, 1865, to the effect that the value of the wood (so cut) should be recovered accordingly; (money was) recovered from the said people as *per* Memorandum, bearing the Mahalkaris signature, bearing the above date." The entry shews that the Government sued some persons as trespassers for cutting down izaili wood in the Government forest, and the Plaintiff claims in his declaration to be entitled to that izaili wood, because he says he is entitled to all izaili wood throughout the village. There is no evidence in the case of any izaili wood being cut down in any other part of the village, excepting in this portion of the village which was reserved as Government forest. The Plaintiff, as it appears to their Lordships, has not made out a title to any teakwood, and he has not made out a case against the Government as to their having cut izaili wood in any place, nor of their having recovered the value of izaili wood cut in any part of the village, except the Government reserves, in which the Plaintiff was clearly not entitled to any of the trees.

Under these circumstances their Lordships are of opinion that the decision of the High Court was right, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed, and that the Appellant do pay the costs of this appeal.

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Solicitors for the Appellant: *Hores & Pattison.*
Solicitor for the Respondents: *H. Treasure.*

RANI LEKRAJ KUAR . . . . . DEFENDANT;
AND
BABOO MAHPAL SINGH . . . . . PLAINTIFF.

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AND

RANI RUGHUBUNS KUAR . . . . . DEFENDANT;
AND
BABOO MAHPAL SINGH . . . . . PLAINTIFF.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE COURTS OF THE COMMISSIONER OF LUCKNOW AND THE JUDICIAL COMMISSIONER OF OUDH RESPECTIVELY.

Indian Evidence Act, 1872, *ss.* 35, 48—*Admissibility—Wajibularz—Reg. VII. of* 1822—*Custom.*

Wajibularz or village papers made in pursuance of Regulation VII. of 1822, regularly entered and kept in the office of the Collector, and authenticated by the signatures of the officers who made them are admissible in evidence under the *Indian Evidence Act*, 1872, s. 35, in order to prove a family custom of inheritance stated therein; or under sect. 48, as the record of opinions as to the existence of such custom by persons likely to know of it. Such records are not invalidated in *Oudh*, because made and kept by the settlement officer or by officers subordinate to him; and not by the Collector as required by the Regulation.

APPEALS preferred from a judgment of the Officiating Commissioner of *Lucknow* (Aug. 28, 1876), and from that of the Judicial

Present:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Commissioner of *Oudh* (Nov. 29, 1876) respectively, which affirmed the decrees and findings of the Court of the Deputy Commissioner of *Bara Banhi* (Oct. 22, 1875, and July 8, 1876), whereby the Respondent was decreed proprietary possession of the talooka *Surajpur*, with reservation to the Appellant *Rani Lekhraj Kuar* for her lifetime of certain villages for the support of herself and of the daughter of Rajah *Udit Pertab Singh*.

The Respondent claimed the property in suit, viz., the talooks of *Surajpur* and *Rawut Sarai* in *Oudh*, on the ground that he, as the nearest male relation of the last talookdar, *Udit Pertab Singh*, who died sonless, was, by virtue of a family custom excluding daughters from inheritance, entitled in preference to the Appellant *Rughubuns Kuar*, the sole daughter of *Udit Pertab* and his heiress according to ordinary Hindu law, and was also entitled to oust from the possession given her by the revenue authorities the other Appellant *Lekraj Kuar*, who contended that she, as surviving widow of Rajah *Singhi*, father of *Udit Pertab Singh*, had a preferential right to the Respondent, and should in no case be ejected by him till he should have proved his title against both the Appellants.

The facts are sufficiently stated in the judgment of their Lordships.

The question decided in this appeal was as to the admissibility in evidence of certain wajibularz papers which were relied upon by the Respondent in order to prove the family custom whereby daughters were excluded from the inheritance.

The fourth paragraph of the wajibularz relating to mouzah *Surajpur* was as follows:—

"4. Of transfer of landed property and succession.

"The talookdar has the power of alienating property by gift, sale, or mortgage. The custom regarding inheritance is that the eldest son of the talookdar succeeds on the latter's demise and becomes absolute master of the entire inheritance. If there be more than one wife, the eldest male member of the family by all the ranis (wives) inherits, and the son of the eldest rani (wife), as such, has no preferential right. Other sons are entitled to maintenance, provided they be obedient to the member who succeeds. Other brothers have no right to claim "seer" or to be disobedient to him that succeeds to the talooka, they must depend for their

maintenance on his choice. No one in case of a misunderstanding has a right to claim a partition or separation contrary to the wishes of the talpokdar. If the talookdar happen to have no offspring, the nearest relation succeeds him. The talookdar has power to adopt during his lifetime the nearest relation from among the sons in the family. After the death of the talookdar, the eldest rani (wife) can succeed and have the same authority as her husband possessed. After the demise of the eldest rani, if she have not adopted anybody during her lifetime, the younger rani succeeds to the estate and has the powers indicated above. If the eldest rani be in possession of the talooka, and there be more than one younger rani, the latter are entitled to maintenance. The concubines and their issues have no right to share whatever,—they get food and raiment from the person getting the inheritance in case of their being submissive to him, and their seclusion in the 'pardah.' If during his lifetime the talookdar has granted a village, seer, or grove to a concubine or her issue, they cannot retain possession after the talookdar's demise, contrary to the wishes of the person to whom the talooka descends in succession. The daughters, whether the offspring of lawfully married wife or of a concubine, have no right or share; they are maintained until their marriage."

Leith, Q.C., and *Cowie*, Q.C. (*Doyne* with them), for the Appellants, referred to the *Indian Evidence Act*, 1872, s. 35, and to Regulation VII. of 1822, s. 9, and contended that the wajibularz did not purport to have been prepared or tested by any officer, or signed or attested by the proper revenue officer, and therefore had not been prepared or recorded in the manner required by either the Regulation or the Act. They appeared simply to record answers given to questions put to various persons by some officers subordinate to the settlement officer employed in making the land settlement of *Oudh*. Excluding those papers as unproved or as inadmissible, there was no evidence at all remaining of the alleged custom.

Graham, and *Mayne*, for the Respondents, were not called upon.

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The question in this appeal is whether the Plaintiff *Baboo Mahpal Singh*, or one of the Defendants, *Rani Rughubuns Kuar*, is entitled as the next heir to *Udit Pertab Singh*, one of the talookdars of *Oudh*, to the talook of *Surajpur*, and another talook of which *Udit Pertab Singh* died possessed. *Udit* died without male issue, leaving a widow, since deceased, and an only daughter, the Defendant *Rughubuns*. The Plaintiff is the nearest male relation of the deceased talookdar, standing in the position of first cousin once removed. On the death of *Udit Pertab Singh*, his widow *Subhraj* was put into possession of the talooks in dispute; but under a compromise with *Rani Lekhraj Kuar*, the step-mother of the deceased talookdar, the possession was given up to *Rani Lekhraj*. That was the state of things when the present plaint was brought, and *Rani Lekhraj Kuar* was alone made the Defendant. The first judgment in the case was given by the Deputy Commissioner when the Record was in this state. On an appeal from his judgment, the Commissioner directed that the daughter, *Rani Rughubuns Kuar*, should be joined as a Defendant, and remanded the case to the Deputy Commissioner, directing a new issue which was necessary in consequence of her being brought into the suit. That issue in substance was whether the Plaintiff or the daughter was the next heir to *Udit Pertab Singh*, and entitled to succeed to his estate. There can be no doubt that by the general Hindu law, which would prevail in the absence of any special custom, the daughter would have been entitled to the inheritance of her sonless father. The question which is raised in the cause, and by the issue which was joined after *Rughubuns* had become a Defendant on the Record, is whether in the *Bahrulia* clan, to which this family belongs, a custom exists to exclude daughters from succeeding to the inheritance of their fathers' estate.

Other questions were raised in the suit, but the only question which remains to be determined is whether the evidence which was given by the Plaintiff to support that custom was properly admissible? This evidence consists of a number of wajibularz, or village administration papers, which state, in a manner which will

be hereafter adverted to, a custom to the effect that daughters are excluded from inheritance in the *Bahrulia* clan. There is no doubt that if those papers are properly admissible in evidence as proof of the custom, *Rughubuns*, the daughter, would be excluded by the custom stated in them. These wajibularz, or village papers, are regarded as of great importance by the Government. They were directed to be made by Regulation VII. of 1822, and it may be as well to read the language of it before adverting to the objections which have been taken to the reception of the papers in the present suit. The 9th section is, "It shall be the duty of Collectors, and other persons exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land;" and other purposes are referred to in this section. Then in the latter part of it there occurs this passage: "The information collected on the above points shall be so arranged and recorded as to admit of immediate reference hereafter by the Courts of Judicature." It is stated by the Judicial Commissioner that officers in administering the Province of *Oudh* were directed to be guided by the spirit of this amongst other resolutions.

The papers which are objected to were offered in evidence and received by the Courts under the 35th section of the *Indian Evidence Act*, 1872. The section is this: "An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

The manner in which these village papers were made up with

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respect to the custom appears to be, that the officer recorded the statements of persons who were connected with the villages in the pergunnah in which this talook is situate. Some of the persons whose statements were taken were the proprietors of villages in the talook; others appear to be the proprietors of villages not in the talook, but in the pergunnah. The Record contains translations of the wajibularz, but not of the whole contents of the papers. Extracts from them only are printed, and these extracts shew that the persons giving the information made statements, which are contained in paragraph 4, declaring the existence of the custom in question. These documents are entered of record in the office, and they must be taken upon the evidence to have been regularly entered and kept there as authentic wajibularz papers. The objections which were taken to their reception are stated in the judgment of the Judicial Commissioner, and are these: "Exception was taken to these documents on the part of the daughter on the ground that they were not prepared or attested by the settlement officer in person as required by Regulation VII., 1822, and that they relate to matters which the settlement officer had no jurisdiction to include in them." Those are the only objections which are stated by the Judicial Commissioner to have been made. A further objection which was relied on by Mr. *Cowie* appears also to have been taken by the daughter in the course of the proceedings, viz., that she was not bound by the statements in question, inasmuch as she was no party to the making up of the wajibularz. Before dealing with these objections, it will be convenient to refer to what the Commissioner says of the documents. He says: "These are official records of admitted customs all properly attested." It must therefore be taken that they are official records kept in the archives of the office, and that they are authenticated by the signatures of the officers who made them, that being what their Lordships understand from the statement of the Commissioner that they are all properly attested.

The first objection, and the one most relied upon, is that these papers were not prepared or attested by the Settlement Officer in person. We have no precise information of the manner in which the Regulations were directed to be of force in *Oudh*, but

the Judicial Commissioner, as already mentioned, says: "Officers in administering the Province were directed to be guided by the spirit of this amongst other Regulations, but they were not tied down to its exact text." It is plain that they could not be so tied down, because the Regulation in question refers to Collectors, and there are no Collectors in the Province of *Oudh*. Therefore in applying this Regulation in its spirit, we must substitute for Collectors and their subordinates the persons who were performing the duties which would have fallen upon Collectors in the parts of *India* to which the Regulation originally applied. These would be the Settlement Officers, or those subordinate to the Settlement Officers, who were employed in making or revising the settlements. The words of the Regulation are:—"It shall be the duty of Collectors and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue," to make up the papers. When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation unless the contrary appears. Upon this objection the Judicial Commissioner makes the following observation: "The mere fact then that the Settlement Records of this Province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves." He was of opinion that the officers who obtained this information, and who attested the record of what they had obtained, were officers subordinate to the Settlement Officer, and this being so, their Lordships think that the Judicial Commissioner was right in holding that the wajibularz were prepared by the proper officers, and that this first objection ought not to prevail.

If then these documents were made by proper officers, is there any valid objection to receiving in evidence the information which they record? The objection taken and referred to by the Judicial Commissioner does not very precisely hit the point which has been argued at the Bar. He says, "The objection was that they"—that is, the administration papers—"relate to matters which the Settlement Officer had no jurisdiction to include in

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them." That objection seems to their Lordships to be unfounded. The officers who were to make the inquiries were directed to ascertain and record "the fullest possible information in regard to landed tenures, the rights, interests, and privilege of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures." This custom of the *Bahrulia* clan relating to the mode of inheritance in the clan seems clearly to be a usage of the kind which the Regulation requires the officer to ascertain and record.

The objection which has been argued is that the papers, upon the face of them, do not shew that the officers had passed any judgment upon the information they received, and contain no record of their opinions or findings upon them. It is true that no express statement of the opinion or finding of the officers appears upon the papers, but their Lordships think that the fact that the officers recorded these statements, and attested them by their signature, amounts to an acknowledgment by them that the information they contained was worthy of credit, and gave a true description of the custom. Suppose the papers had had a heading such as the following: "The usages of the *Bahrulia* clan appear in the information recorded below." This would undoubtedly be an expression by the officer of his opinion that the statements contained a correct description of the custom. Then, when we find that the statements are recorded and authenticated in the manner that has been mentioned, and placed in the Government Records, ought it not to be implied that the officer has in effect affirmed that the information embodied in the recorded statements was true, and described an existing custom? Their Lordships think that such an implication may in this case be properly made.

The *Indian Evidence Act* has repealed all rules of evidence not contained in any statute or regulations, and the Plaintiff must therefore shew that these papers are admissible under some provision of the *Indian Evidence Act*. That relied on is the 35th section, which has been already read. It is necessary to look at the precise terms of this section; and for the present purpose it may be read: "An entry in any official record stating a fact in issue or relevant fact, and made by a public servant in the dis-

charge of his official duty, is itself a relevant fact." There can be no doubt that the entries in question, supposing them to bear the construction already given to them, state a relevant fact, if not the very fact in issue, viz., the usage of the *Bahrulia* clan. If so, then the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact; that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant.

There is another ground upon which it is said that these entries would be admissible. Supposing that these papers were not to be treated as records themselves describing the custom, but as recording only the opinions of persons likely to know it, the 48th section would appear in that view of the entries to make them admissible. The 48th section is, "When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant." Then if opinions of this nature were relevant, the entry of such opinions in an official record is itself a relevant fact, which makes the entry admissible. There may be doubt whether what for the present purpose are assumed to be opinions would fall under the 48th clause, or the 49th, which is as follows, and refers to family usages: "When the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge therein are relevant facts." It is enough for their Lordships, without giving an opinion on this last ground, to rest their decision as to the admissibility of the entries on the first ground. Placing the admissibility of the papers on this ground, the *Evidence Act* does not appear to have altered the law with regard to papers of this description, for it had been decided by the High Court of the North-Western Provinces that wajibularz papers, being a record of rights made by a public servant, were admissible in evidence and entitled to weight in proof of village customs. That case is found in the 2nd volume of the North-Western Provinces High Courts Reports, page 397 (1).

(1) *Dabee Dutt* v. *Sheikh Guayat Ali and Others.*

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On the part of the daughter it was objected that being no party to the making up of the papers, she was not bound by the statements in them. She is, no doubt, not bound in the sense of being concluded by them. They do not in any way estop her from asserting her right or disputing the custom which is stated in them. They are only received as evidence, and are open to be answered, and the statements in them may be rebutted. No evidence however was given on the part of either of these Defendants to shew that the custom did not exist, and their Lordships cannot but observe that if the custom did not exist, nothing could have been easier than to obtain proof of descents and successions to property, which would negative it. It appears that there are numerous villages in this talook, and more in the pergunnah; the *Bahrulia* clan is a large one, and if the custom did not exist the Defendants must have had means, to be obtained without difficulty, of disproving it.

Their Lordships therefore think that these administration papers were properly admitted in evidence, that the objections made to their reception have failed; and that being so, it is not disputed that they contain full proof of this custom.

Their Lordships are of opinion that the judgments of the Court below are right, and they will humbly advise Her Majesty to affirm them, and to dismiss the appeal with costs.

Solicitor for the Appellants: *T. L. Wilson.*

Solicitors for the Appellant: *Watkins & Lattey.*

J. P. WISE AND OTHERS . . . . . PLAINTIFFS;

AND

AMEERUNNISSA KHATOON AND OTHERS . DEFENDANTS.

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Dec. 11, 12, 19.

J. P. WISE AND OTHERS . . . . . PLAINTIFFS;

AND

COLLECTOR OF BACKERGUNGE AND OTHERS . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Reg. XI. of 1825—*Re-formation of Lands—Possession—Prescription.*

In a suit brought on the 11th of March, 1872, to recover certain plots of land, (1), as re-formations after diluviation of lands which had belonged to the Plaintiffs and as accretions thereto, (2), under a title by prescription; it appeared that the lands had formed in the bed of a river in 1859, and that the Plaintiffs took possession thereof as of re-formed lands and had been maintained in possession under Act IV. awards, but that in 1868 they were ousted by the Collector, who assessed the same under Reg. XI. of 1825, and settled the same with his co-Defendants:—

Held, that whether or not in consequence of Act IX. of 1847 the Government were entitled to assess the lands, they were entitled to oust the Plaintiffs and to take possession of the lands as lands which had originally formed as an island, and were at their first formation surrounded by water which was not fordable;

Held, further, that sect. 15, Act XIV. of 1859 barred the Plaintiffs' title to recover simply on the strength of their previous possession, without entering into the question of title; the suit not having been brought within six months of dispossession.

Held, further, that possession for three years under an order of a magistrate in a proceeding under Act IV. of 1840 does not create a title by prescription.

THESE were consolidated appeals from two judgments of the High Court (Sept. 14, 1875). Those judgments were delivered on two appeals preferred respectively by the Appellants and by the Respondents *Ameerunnissa* and *Krishna Chunder Chatterjee* from a judgment of the Judge of *Backergunge* (Jan. 5, 1874) which partly decreed and partly refused the relief prayed by the Appellants. The suit (March 11, 1872), related to certain alluvial

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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lands of a measured area of beegahs 3414–16–5, which had been thrown up as churs by the River *Arialkhan* in the district of *Backergunge*. The lands in dispute were those referred to in the judgment printed below as marked upon the Civil Court's Ameen's map in the record as B, C, D, E, and F. Of those lots the Appellants claimed all D, E, and F, and ten annas of B and C. They made no claim in the suit in which this appeal arose to any part of A, which as well as the remaining six annas of B and C had been the subject of previous litigation.

The Appellants claimed the lands in suit as re-formations after diluviation of original lands of their own which had been some of them wholly and others in great part diluviated. They alleged that they had taken possession of these re-formations as they formed. They contended that as to ten annas of B and C and the whole of D, their right was established by previous adjudication, and that as to E and F they had been rightfully in possession of them as re-formation, and they complained of the proceedings of the survey authorities in having disturbed that title and the possession under it and having given possession by means of an order of a magistrate under sect. 318 of the *Criminal Procedure Code* to, and having made a settlement with the Respondents *Ameerunnissa Khatoon* and *Krishna Chunder Chatterjee* of all the lands in suit.

The Defendants were the Government of *India*, represented by the Collector of *Backergunge* and the two last-named Respondents.

The written statement of the Government of *India* was as follows:—

"The Plaintiffs state that the revenue authorities assessed the land in question, and that they were dispossessed by an order of the Criminal Court.

"It is the duty of the revenue authorities to assess alluvial accretions in order that the revenue due to Government may be paid. It appeared to them that the Defendants were entitled to the settlement, and no action will lie against Government if the opinion of the settlement officer was in that respect erroneous. No suit will lie against Government for any judicial order passed by the Criminal Court, or for any act done in pursuance thereof. It is immaterial to Government whether its revenue is paid by the

Defendants or by the Plaintiffs. The Government therefore prays that this suit may be dismissed with costs so far as it regards the Government."

The defences of the other Defendants were separate, and were in substance as follows:—

"*Krishna Chunder Chatterjee* denied that the lands in suit were re-formations on the site of the Plaintiffs' villages, and claimed them as accretions on estates in which he was jointly interested with others, including the Defendant *Ameerunnissa Khatoon.*"

The facts appear in the judgment of their Lordships. The Judge of *Backergunge* decreed that the Plaintiffs recover possession of ten annas of B and C and of the whole of D with costs against the Collector and *Ameerunnissa Khatoon* in respect of the portion of the claim decreed. So much of the claim as related to E and F was dismissed with costs.

The Appellants appealed as to E and F; *Krishna Chunder Chatterjee* filed a petition of objection as to D, and *Ameerunnissa* appealed as to B, C, and D. The Collector did not appeal on behalf of the Government.

The High Court held that the Plaintiffs had failed to prove their right by prescription as well as their title to any of the land claimed, reversed the order of the Judge as to B, C, and D, and decreed the appeal with costs. By a judgment of the same date the High Court dismissed the appeal of these Appellants as to E and F, which the Court held could only be claimed as accretions to B, C, and D.

Leith, Q.C., and *Doyne*, for the Appellants.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is a suit brought by Mr. *J. P. Wise*, and other persons of the name of *Bysack*, against several Defendants; first, the Government represented by the Collector of *Backergunge;* secondly, *Ameerunnissa Khatoon;* and thirdly, *Krishna Chunder Chatterjee,*

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for himself and as guardian of the widows of *Bykunt Chunder Chatterjee*. Certain other persons as the representatives of *Moulvi Wahed Ali* and of *Moulvi Abdool Ali* were afterwards, on the application of the Plaintiffs, added as Defendants on the record.

The suit relates to certain plots of land, B, C, D, E, and F, marked in an Ameen's plan made previously to a settlement in 1868. The Plaintiffs claim 10 annas of B and C, the whole of D, and the whole of E and F. They allege that the plots B, C, and D were re-formations of lands which belonged to them, and that E and F are accretions to D, or to B, C, and D. They also contend that, even if they failed to establish this title, they had, under the circumstances to be hereafter stated, obtained a title to what they claim in this suit by prescription. The case was tried before the Judge of *Backergunge*, and it was found by him, and that portion of his judgment was affirmed by the High Court, and it is not now disputed, that the Plaintiffs altogether failed in making out their title by re-formation.

The only substantial question which remains is, whether they are entitled to recover upon the ground that they had obtained a title to the 10 annas of B and C, and to the whole of D, by prescription. The first Court found that the Plaintiffs had obtained such a title; but that decision was overruled by a judgment of the High Court from which the present appeal has been preferred. The long course of litigation with regard to the lots in dispute, and also with regard to a lot A, which is not now in dispute, is thus shortly described by the Judge in his judgment. He said, "It seems necessary here to refer to the portion marked A, which, though not the subject of the present claim, has been the subject of similar litigation between the Plaintiffs and the Defendants 2 and 3. It will be seen on the map that A is the northernmost portion of the series of churs of which B, C, D, E, and F are the portions now in dispute. A, it is said, first formed as an island in 1261, and the Plaintiffs took possession of it as having re-formed on the site of the diluviated kismuts, *Chur Selimpore*, &c. Defendant No. 2 claimed it as an accretion to *Andar Chur*, which is a part of *Chur Kalkini*, and was held by Defendant in ijara from Government. A case was instituted under Act IV. of 1840, which resulted in the Plaintiffs being

maintained in possession. Subsequently B and C formed in 1858 or 1859, and similarly in a case under Act IV. of 1840 the Plaintiffs were maintained in possession. In 1859 and 1861, Defendants Nos. 2 and 3 and *Abdul Ali*"—2 and 3 being *Ameerunnissa* and *Bykunt Chatterjee*, who is now represented by the other *Chatterjees*—"brought suits in the Civil Court to set aside these Act IV. awards. Defendant No. 2, in suit No. 85 of 1859, sued to establish her title to A; *Abdul Ali*, in No. 366 of 1861, sued to establish his title to 2 annas of A; and in No. 283 of 1861, Defendant 3, or rather his predecessor in interest, *Bykunt Chunder Chatterjee*, sued to establish his title to 6 annas of A, B, C, D. The Principal Sudder Ameen, whose decisions were affirmed by the High Court (see 2 Suth. W. R 34 and 127), decreed all three suits except in regard to D. So that by these judgments the whole of A was decreed to the Defendants 2 and 3 and *Abdul Ali*, and 6 annas of B and C were decreed to Defendant 3." The Plaintiffs remained in possession of 10 annas of B and C, the whole of D, and the whole of E and F up to the year 1868, when they were ousted therefrom on behalf of Government by the Collector who settled them with the Defendants. The High Court in their judgment upon appeal from the decision of the first Court, say: "As regards the question whether the awards under Act IV. of 1840 in favour of the Plaintiffs, and the failure of the Defendants Nos. 2 and 3 to set aside these awards by civil suits instituted by them, have given Plaintiffs such a title as will enable them to recover possession, it was urged that the Plaintiffs had not been in possession of any of the land claimed long enough to give them a title by prescription, for that the first re-formation of any of the land did not take place until 1859, and the Plaintiffs were admittedly deprived of possession in 1868. Further, that the Plaintiffs' title by prescription would not avail against Government; that it was clear that all these churs were formed in the bed of a navigable river, and were not re-formation of the Plaintiffs' villages; that first they appeared as an island, and then became fordable from the *Kalkini* side; that first the portion of the chur marked A appeared and subsequently became annexed to *Kalkini*, and then that the other portion joined on to A; and thus that, irrespective of the Government right to these as an island forming

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in the bed of a navigable river, they also became accretion to a Government estate, for *Chur Kalkini* belongs to Government, and A and the other lands accreted to it."

It had been held in a decision of the High Court that when lands are formed as an island in the middle of a river, and are surrounded by water which is not fordable, they do not belong to Government, if before the Government takes possession any portion of the water round the island becomes fordable from an adjacent estate; and the before-mentioned suits, in which the Defendants succeeded, were decided in accordance with that ruling. But that decision was overruled by the High Court in a Full Bench decision in vol. xiv. of the Full Bench Rulings of the *Weekly Reporter*, p. 28, and the High Court referring to it, say: "The Full Bench Ruling of the 17th of August, 1870 (reported in W. R. vol. xiv. p. 28, Full Bench Rulings), was referred to as shewing that under the terms of clause 3, sect. 4, of Regulation XI. of 1825, these lands being at the time of their first formation the property, or to use the words of the Regulation, at the disposal of the Government, they could not subsequently become vested in the Plaintiff or any one else. On the other hand, for the Plaintiffs, it was argued that the Lower Court's decision was right, that there had been constant litigation between the parties, that *Ameerunnissa* had always failed to prove her title, that Mr. *Wise* had been declared entitled to retain possession, and that his possession under an Act IV. award of the re-formed lands for more than three years revived his right to those lands. From the above statement it will be seen that the Plaintiffs do not seriously dispute the finding of the Lower Court, that they have failed to establish their title to any portion of the lands in dispute, on the ground of re-formation on the original sites belonging to them; but Plaintiffs argue that the Judge was right in holding that their title by prescription had been made out. Now the Judge in deciding this point appears to have overlooked the fact that the Government have been made the principal Defendants, that it was the Government who dispossessed the Plaintiff and who settled the land with the other Defendants, inasmuch as their title by prescription will not avail them against the Government, for it is clear that the taking

possession by a party not entitled will not give them a title unless the possession has been of such duration as to extinguish the title of Government. In the present case it has been found that the lands only began to re-form in 1859, and as the Plaintiffs were admittedly dispossessed in 1868 they had not been in possession twelve years when dispossessed." The High Court, therefore, overruled the decision of the Lower Court that the Plaintiffs had obtained title by prescription.

It appears that *Kalkini* was originally gained from the river *Arialkhan*, in the district of *Backergunge*, and that Government had assessed it, as they had a right to do, under Regulation XI. of 1825. It was settled as an accretion to lands which belonged to *Ameerunnissa* and *Mahomed Wasil;* eight annas with *Ameerunnissa* for twenty years from the 3rd of May, 1848, and eight annas with *Mahomed Wasil* for twenty years from the 10th of May, 1848. *Mahomed Wasil* failed to pay the revenue as to his eight annas, and the Government took possession and granted a lease of it to *Ameerunnissa* for twelve years, which expired in 1867. The settlement of *Kalkini* having expired in 1868, the Government re-settled it and included the whole of the lands, B, C, D, E, and F, as part of *Kalkini* in the new settlement. It was found by the Ameen, who was deputed to make a local investigation, that the lands were formed in the bed of the river. They, therefore, according to the Full Bench ruling, reported in the 14 *Weekly Reporter*, Full Bench Rulings, p. 28, belonged to Government, who were entitled to take possession of them. The Plaintiffs say in their plaint, "The Defendant No. 1"—that is, the Collector—"on the occasion of the re-settlement of *Chur Kalkini* on the part of the Government, caused the entire area of the said chur"—that is, the whole of the lands which are claimed in the declaration—"to be measured with *Chur Kalkini*, and ousted us therefrom in the beginning of 1275, and made a settlement thereof with the Defendants Nos. 2 and 3, after disallowing our objections." *Ameerunnissa* did not act in violation of Act IV. of 1840. It was the Government who were entitled to the property, who took possession of the land and put *Ameerunnissa* and the other Defendant into possession of it under the new settlement.

It was contended that the Government could not in consequence

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of the provisions of Act IX. of 1847 include the lands which are now in dispute with *Chur Kalkini* without a new survey. The matter was referred to the Commissioner, and the Commissioner thought that the Government had no right to make the settlement; but the Defendants, having been put into possession by the Government, they proceeded under sect. 318 of the *Criminal Procedure Code*, which had been substituted for Act IV. of 1840, and obtained an order against *Wise* and others by which they were to be retained in possession. That is also stated by the Plaintiffs in their plaint. They say: "The Collector having ousted them from the lands in dispute, made a settlement thereof with the Defendants Nos. 2 and 3 after disallowing our objections. The Commissioner, on our appeal, ordered the said land to be excluded from the said settlement, but a suit was instituted for possession under sect. 318 of the *Criminal Procedure Code*, and on the 9th of August, 1869, it was ordered that the land should remain in possession of the Defendants Nos. 2 and 3. Moreover under the orders of the Revenue Board, dated the 31st of October, 1870, the said lands have again been brought under settlement." The case had come on appeal from the Commissioner to the Board of Revenue, and they had held that the Government was justified in making a settlement of the lands as a part of *Kalkini*.

Even if the Government was not entitled to assess the lands in consequence of Act IX. of 1847, they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and they were entitled to oust the Plaintiffs, who were trespassers, and to put the Defendants into possession.

It is quite clear that the Plaintiffs have failed to make out a title. The Defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the *Code of Criminal Procedure* to be retained in possession. If the Plaintiffs had wished to contend that the Defendants had been wrongfully put into possession and that the Plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under sect. 15 of Act XIV. of 1859; but they did not do so. The

High Court, with reference to this point say (and, in their Lordships' opinion, correctly say): "Further, *de facto* possession having been given to the Defendants under sect. 318 of the *Code of Criminal Procedure*, in accordance with the Deputy Collector's award, the Plaintiff will not be entitled to a decree until and unless he can shew a better title to these lands than the Defendants. The fact that the Plaintiffs' possession as regards B, C, and D was confirmed under Act IV. of 1840, and that the Defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by regular suit, does not bar the right of Government. Sect. 2 of Act IV. of 1840 only affects persons concerned in the dispute. If *Kalkini* had belonged to a private individual he might have reduced into his own possession lands which had accreted to the estate and which undoubtedly were his. But lands to which he is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under sect. 15 of Act XIV. of 1859, which must be brought within six months from the time of that dispossession."

Their Lordships are of opinion that the High Court was right in holding that the Plaintiffs had failed to prove a right by prescription. Act XIV. of 1859, sect. 1, clause 7, enacts that, "To suits brought by any person bound by any order respecting the possession of property made under clause 2, sect. 1, Act XVI. of 1838, or of Act IV. of 1840, or any person claiming under such party for the recovery of the property comprised in such order, the period of three years from the date of the final order in the case." This, however, is not a suit brought by *Ameerunnissa* and the other Defendants, but it is a suit brought against them. Act IV. of 1840 had nothing whatever to do with title, it merely regarded possession. The Magistrate was not to inquire into title, but merely to ascertain who was in possession *de facto*, and to retain him in possession. Their Lordships are of opinion that, independently of the title of Government to the lands which appear to have been originally formed as an island in the bed of the river, possession for three years under an order of a Magistrate in a proceeding under Act IV. of 1840 does not create a title by prescription.

The Plaintiffs' suit was therefore properly dismissed as to B,

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C, and D. As regards plots E and F, it was found by the first Court that they were not originally accretions to D, and that the Defendant *Ameerunnissa* had satisfactorily established the fact that they belonged to her.

The Plaintiffs, upon the appeal of the Defendants to the High Court, objected to the decision of the first Court as to E and F upon the ground that they were entitled to them as accretions to B, C, and D; but the High Court held that as they had found that *Wise* had no title to B, C, and D, his claim must fail as to E and F. The Appellants having appealed to Her Majesty against the judgment of the High Court as to B, C, and D, appealed also as to E and F upon the ground that they were accretions to B, C, and D. But their Lordships, having affirmed the judgment of the High Court as to B, C, and D, it follows as a matter of course, upon the Appellant's own contention, that the decree as to E and F must also be affirmed.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decree of the High Court.

Solicitor for Appellants: *T. L. Wilson.*

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JOHN GOTHFRIED SIGG AND ANOTHER . PLAINTIFFS. *Jan.* 13, 14, 15, 16; *Feb.* 21.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Construction—Revocable Agreement—Recitals.

The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

Where on the true construction of the operative part of a mortgage instrument it appeared that the same was intended to cover the general balance that might become due by the mortgagors to the mortgagee in the course of their business transactions:—

Held, that the security could not be limited by the recital to such portion only of the general debt as consisted of advances made upon contracts for future delivery of produce, where the words of the recital were not necessarily repugnant to such construction.

Where by an agreement between debtor and creditor prescribing some of the terms on which their future dealings should be carried on, it was provided that an agreed balance should be liquidated by "returns only" made upon future contracts, but the agreement fixed no time for its duration or for such liquidation, or for the extent of business to be done, the result being that if either party were disposed to act unreasonably he would have the means of postponing the liquidation of such balance indefinitely:—

Held, that such agreement was revocable. It could not be implied from the terms of the agreement that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until such agreed balance should be liquidated in the manner thereby provided. The parties having abstained from inserting express provisions for the fair and reasonable working of their supposed agreement, the Court would not supply them.

APPEAL from a decree of the High Court (Feb. 21, 1878) which dismissed with costs an appeal of the above-named Appellants from a decree of the District Judge of *South Malabar* (July 16, 1877). A cross suit brought by the Appellants against

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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the Respondents was, on the 16th of July, 1877, dismissed without costs, and the judgment therein affirmed by the High Court. No appeal was made in the cross suit to Her Majesty in Council.

In the first suit brought, on the 10th of December, 1875, the Respondents sought to recover from the Appellants the sum of Rs.405,779. 13*a*. 9*p*., being Rs.180,897. 5*a*. 2*p*., alleged to be due on what is hereinafter described as a block account, and Rs.224,882. 8*a*. 7*p*., alleged to be due on what is hereinafter described as interest account, together with interest at the rate of 9 per cent. per annum on the last-mentioned sum from the 7th of December, 1875, till payment. They also prayed that two instruments of mortgage dated the 21st January, 1873, and the 25th of October 1873, might be declared in respect of the said sums and interest valid and subsisting mortgages by the Appellants to the Respondents of the properties comprised therein. In the second suit the Appellants sued for delivery up of the said mortgage deeds, and for specific performance of an agreement hereinafter more particularly referred to, and dated the 2nd of January, 1874.

The circumstances out of which the suit arose and the proceedings therein, are detailed in the judgment of their Lordships. The main documents in the case, upon the construction of which the arguments and decision chiefly proceeded, are as follows:—

On the 21st of January, 1873 the Appellants being greatly indebted to the Respondents, addressed through the first-named Appellant to the Respondent the following letter of that date which is hereafter referred to as an instrument of mortgage. (Exhibit I.)

"Dear Sirs,—As I have been, and am now, accustomed to contract with you for the supply of country produce and other merchandise, and we are mutually, I presume, anxious to continue the relationship—and, in the course of these transactions, there is frequently a considerable amount of money, outstanding to my debit in the way of advances, etc., made upon the contracts—and you very naturally would like some security, I agree to the following proposition which, if it meets with your approval, be good enough to countersign, and the matter will be satisfactory to both parties.

"I possess various landed properties in *Cochin* and elsewhere, some in jenm, some in kanom and other titles. For convenience, I have stated them all in the list at the end of this letter. I have written, in the 9th column, the title on which each is held, and, in the 10th column, I have stated how far, if at all, I have made any charges upon them, and except as I have stated there they are quite free. Now I will give up to you all the available title-deeds of the seproperties, and have made a list of them in the 11th column, and you shall hold them as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property, as a pucka mortgagee would have; only you must agree not to sell any of it, until you have given me full twelve months' notice, from the time we shall come to a settlement of accounts to pay up, or from the time demand shall have been made by you of the amount claimed by you; but, if I fail then, you may sell, at my expense, for the best price you can get, any of the properties successively, till you have satisfied my account current, out of the proceeds, giving me a strict account of what you sell.

"I hereby engage that I will not attempt to dispose of or pledge any of the properties in the list, without first getting a letter from you consenting to it, and upon my payment of all balances due, you will at once return to me all the documents now deposited with you and cancel this letter.

"If by any evil chance we should not be able to agree in the amount due, then, instead of going to the Courts, we will each call in a friend to arbitrate, and, if necessary, they shall appoint an umpire and we will each abide by the award.

"In any changes that may take place in the members constituting the firm, this agreement shall remain unaffected.

On the 25th of October, 1873, exhibit J was written and addressed by and to the same parties: "In continuation of my letter of the 21st of January, 1873, I beg to hand you further securities, as per schedule annexed, subject to the conditions contained in my above-mentioned letter."

On the 2nd of January, 1874, the then members of the Respondents' firm and the Appellants, under the circumstances stated in

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their Lordships' judgment, entered into an agreement referred to as exhibit L, which was as follows:—

"Whereas *P. Marcar* stands indebted to the said *Volkart Brothers* to the amount of Rs.678,012. 10*a*. 1*p*. per 30th of June, 1873, as per account current rendered and approved of, the following conditions have been agreed upon by both parties for the repayment by *P. Marcar* of the money due to *Volkart Brothers*.

"1. The debt of *P. Marcar* to *Volkart Brothers* to be divided into two distinct parts for which separate accounts are to be kept.

"2. The first account—to be styled '*P. Marcar's* Block Account'—shall be debited for Rs.300,000, computed to be the total amount of the said *P. Marcar's* losses on his old transactions with *Volkart Brothers*. No interests are to be debited or credited on this account.

"3. The second account—to be styled '*P. Marcar's* Interest Account'—shall be debited with Rs.378,012. 10*a*. 1*p*. per 30th of June, 1873, being the balance of the amount due to *Volkart Brothers* by *P. Marcar*—interest at the rate of 9 (nine) per centum per annum to be calculated on this account on both the debit and credit side, and balance of interest to be paid in cash by the 30th of June of each year. Should, however, on the 30th of June, 1875, *Volkart Brothers* feel satisfied that *P. Marcar* has given them every assistance to forward business, they promise to return him 3 per cent. of the 9 per cent. charged on this account, thus reducing the actual rate to 6 (six) per centum per annum for credit and debit side—the same reduction of interest to be made subsequently, until the entire settlement of this account, should *P. Marcar* continue to afford the same satisfaction.

"4. The 'Block Account,' as described in paragraph 2, shall be liquidated by returns only on all contracts of *P. Marcar* with *Volkart Brothers*, according to the following scale:—

				Rs.	A.	P.	
On every cwt. of coffee contracted or purchased				3	0	0	(three)
Do.	do. of pepper	do.	do.	1	0	0	(one)
Do.	Candy of C. N. oil	do.	do.	3	0	0	(three)
Do.	do. Fish oil	do.	do.	2	0	0	(two)
Do.	do. Coprah	do.	do.	2	0	0	(two)
Do.	do. Coir yarn	do.	do.	2	0	0	(two)

"5. The returns, which *P. Marcar* has already made or has

agreed to make on fulfilled or pending contracts respectively, amounting to Rs.53,056 13*a.*, as per Memo. No. 1 annexed, are to be placed to the credit of '*P. Marcar's* Block Account.' All other sums of money hitherto paid by the said *P. Marcar* in cash, goods, consignments and by the sale of refuse cocoanut oil, on and after the 1st of July, 1873, as per Memo. No. 2 annexed, are to be credited to '*P. Marcar's* Interest Account.'

"6. *Volkart Brothers* engage to grant *P. Marcar*, if required by him, advances on all contracts of coffee they may enter into with him, such advances, however, not exceeding 50 (fifty) per centum of the respective contract price—the balance or balances to be paid by *Volkart Brothers* at such times and in such proportions as the coffee may be delivered into their premises. As regards advances on other articles but coffee, this must always be a matter of special agreement at the time of each contract, it always being understood that the aggregate amount of running advances on pending contracts shall at no time exceed Rs.150,000 (one hundred and fifty thousand rupees) in all—such advances of course to be given in proportion to contracts only and not to be considered as continuing advances.

"7. This agreement shall not be considered infringed, should *Volkart Brothers* see fit to make advances to *P. Marcar* in excess of the Rs.150,000, stipulated in paragraph 6, to facilitate business.

"8. *P. Marcar* engages not to sell or offer any produce to any other firm without first having offered such goods at same or lower rates to *Volkart Brothers*.

"9. Copies of all future contracts entered into with *P. Marcar* by *Volkart Brothers* to be given him; those of contracts Nos. 1 to 12 inclusive have already been rendered.

"10. This agreement to be binding on the heirs, executors, administrators, and assigns of both the contracting parties.

"11. This agreement has been made out in double, one for *P. Marcar*, the other for *Volkart Brothers*.

"*Cochin*, 2nd day of January, 1874."

Benjamin, Q.C., and *Mayne*, for the Appellants, contended upon the evidence that the Respondents had not established any such

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breaches of the agreement L as would justify them in rescinding it. It was not a revocable agreement, or expressed or intended so to be, and while it exists payment of the debt acknowledged thereby can only be obtained in the manner provided by it. That was the construction put upon it by the Respondents in their plaint, and in the additional issues which they unsuccessfully endeavoured to record and in their correspondence previous to the suit. As regards the mortgages the construction thereof must be controlled by the recital, and there it appears that the property was not pledged for the debt sued for, but for the advances made upon contracts. The Respondents moreover did not follow the course prescribed by the mortgage instruments, and had failed to give the prescribed notice. Reference was made to *M'Intyre* v. *Belcher* (1) and to *Stirling* v. *Maitland* (2).

Herschell, Q.C., and *Scoble*, Q.C. (*Cowell* with them), for the Respondents, contended that the mortgages, on their true construction, provided that the properties scheduled thereto should be successively answerable for the whole amount claimed by the Respondents on settlement of all accounts, whether purchase, consignment, interest, or general until all balances due were paid and the account current had been satisfied. As regards L, it was contended that that did not, according to its true construction, prevent the Respondents from bringing this suit. There was no engagement on the part of the Respondents to continue to carry on business with the Appellants beyond the date to which they continued so to do, nor any consideration for such engagement, nor any corresponding engagement upon the part of the Appellants. The agreement in no way operated or was intended as postponing the liability of the Appellants beyond the date of suit, or at all, but as prescribing a mode of liquidation favourable to the Appellants, so long as the Respondents and Appellants mutually chose to continue the transaction of business.

Mayne replied.

(1) 32 L. J. (C.P.) N.S. 254; 14 C. B. (N.S.) 654.
(2) 34 L. J. (Q.B.) N.S. 1.

Feb. 21. The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The Respondents (the Plaintiffs in the suit out of which this appeal has arisen) are merchants carrying on business at *Winterthur*, in *Switzerland*, under the style of *Volkart Brothers*. Their house had subordinate branches or agencies in *India* for the purposes of their trade with that country. Of these, the head or principal one was at *Bombay*, and under the management of a Mr. *Knapp;* the other was at *Cochin*, where the transactions in question took place, and was managed, up to some time in February, 1874, by a Mr. *Spitteler*, and after that date by a Mr. *Jung*, who had previously been his assistant.

The Appellants, the Defendants in the suit, are native merchants at *Cochin*, trading under the style of *P. Marcar*, the second Defendant being the active partner of the firm.

The history of the transactions between the Plaintiffs, through their agents at *Cochin*, and the Defendants may be conveniently divided into three periods, the first ending with the annual settlement of accounts up to the 30th of June, 1872; the second beginning from that time and ending with the execution of the agreement L, on the 2nd of January, 1874; and the third, which comprehends the transactions under that agreement, ending with the institution of the suit on the 10th of December, 1875.

The first is material only in so far as it shews what was the course of dealing between the parties whilst there was no substantial (if any) dispute between them. Their transactions were of two kinds. The first and more important class consisted of purchases, chiefly of native-grown coffee, oil, and pepper, made by the Defendants from the producers and delivered to the Plaintiffs' agent at *Cochin*, for shipment to their firm in Europe. These were almost invariably made upon contracts for future delivery at a stipulated price, of which the following, made on the 23rd of September, 1872, may be taken as an example. The material parts of it are as follows:—

"Contract with *P. Marcar*, of *Cochin*, for 1000 cwts. *Malabar* native coffee, at Rs.30½ per cwt., delivery on or before the end of January 1875.—I, the undersigned *P. Marcar*, of *Cochin*, agree

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and bind myself to deliver to Messrs. *Volkart*, of *Cochin*, on or before the end of January next, one thousand cwts. *Malabar* native coffee," to be packed, garbled, and delivered as therein mentioned, "at the price of thirty and a half rupees per cwt. net. . . . . On account of which agreement I have this day received from *Volkart and Brothers* the sum of Rs.50, the balance to be paid as agreed. In case of non-fulfilment of this agreement, I bind myself to pay to Messrs. *Volkart Brothers*, as penalty, Rs.3 for each cwt. short delivered."

It is to be observed that the Rs.50 mentioned in this form of contract was rather in the nature of earnest money to bind the contract than the measure of the advance made to enable the Defendants to perform it. Such advances were almost invariably made, but they seem to have been made on general account, the particular amount of advance attributable to each particular contract being, apparently, settled orally under the provision expressed in the words "to be paid as agreed," and deducted from the price when that was adjusted on the delivery of the produce. That this was so appears by the receipts for advances, the adjustment of particular contracts, and the copies of "purchase accounts" set out in the record.

The other class of transactions consisted of consignments to *Europe* by the Defendants on their own account, made through the firm of *Volkart Brothers*. There were thus cross accounts between the Plaintiffs and Defendants, viz., the purchase account and the consignment account, which were kept separately under these titles, and besides these there appears to have been an "interest account," the nature of which it is difficult precisely to define, but which was certainly different from the "interest account" to be spoken of hereafter. These three accounts would naturally result in a general account current between the two firms, which Mr. *Jung* swears was regularly kept. The date as on which these accounts were balanced, and ought to have been settled, was the 30th of June in each year. But such settlement, at all events of the general account current, does not appear to have been very regularly made, since the account K, which purports to shew the balance of the general account current on the 30th of June, 1873, comprehends items which ought to have been

included in the account for the preceding year, and was not finally adjusted until March 1874. It may, however, be collected from the purchase account A, the consignment account B, and the interest account D, that the general balance due from the Defendants to the Plaintiffs on the 30th of June, 1872, was about Rs.168,867. 8*a*. 10*p*.

The price of native coffee rose in the latter part of 1872 and 1873. On the 24th of January, 1873, Mr. *Spitteler*, who then managed the *Cochin* agency, obtained from the Defendants security in the shape of the letter I, and the deposit of the title-deeds therein mentioned. The true construction of this letter, which is one of the principal questions in the cause, will be afterwards considered. In February 1873, the price of coffee having risen to Rs.40 per cwt., it became manifest that the Defendants could not fulfil their contracts with Plaintiffs for deliveries in 1873 without heavy loss. In these circumstances, Mr. *Spitteler* made to them further and extraordinary advances, amounting to Rs.500,000 in the whole, by payments which in the Defendants' case, are stated to have been made on the 12th, 13th, and 19th of February, and the 8th of March, 1873. It became a matter of controversy in this suit what were the object, nature, and effect of this transaction. The Defendants have set up that they threatened to abandon their contracts on the terms of repaying the particular advances attributable to them, and of paying the stipulated penalty of Rs.3 per cwt.; that they were persuaded by Mr. *Spitteler* to forego this intention, and to accept the advances, on the understanding that the money was to be employed in buying coffee at the market price on account of *Volkart Brothers*, on whom the losses incurred in this operation were to fall. Mr. *Spitteler*, on the other hand, has deposed that, when the advances were made, the coffee deliverable on the contracts for 1873 had been all, or nearly all, actually or constructively delivered (an assertion hardly borne out by the terms of the contracts or other evidence in the cause), and that the advances were made in order to enable the Defendants to pay for the coffee, and thus to obtain the command of the market for the following season.

The best evidence of what was understood by the parties to be the nature of the transaction between them is that afforded by

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their written statements made at the time. These have been admitted, without objection, on the record. Mr. *Spitteler*, advising his principals in *Europe* of these advances, when they amounted to only Rs.300,000, wrote, on the 19th of February, 1873, as follows:—

"Coffee. On the coast Rs.40 to Rs.40½ are readily paid, but most of the dealers find it already now impossible to get produce, and it is already pretty distinctly and openly said that *E. Baudry & Co.* have received notice from their contractor, *Baboo*, according to which a great part of their contracts will remain unfulfilled. The reason we can explain easily. *Marcar* has not only 5000 cwts. over his contracts already had delivered to him, but his friend *Ramon* has still about 20,000 cwts. in his possession, which are in the first place reserved to *Marcar*. As he actually requires money for these payments, we have agreed with him that he should not sell for one month, without our sanction, either to natives or exporters, but should keep in his possession the whole quantity for the chance of orders. There against we advanced him three lacs, and he has to make good to us all interest, back commissions, &c., in case we should not find any employment for the remaining coffee, otherwise we shall bear these charges ourselves, but shall pay *Marcar* a corresponding lower rate than market rate. Through this arrangement we have enabled *Marcar* partly to recoup himself for the sustained loss, whereas we, on the other side, reserve ourselves a good chance to do some further considerable business this season. We have no doubt, under the exceptional circumstances, you will approve of our having done so, especially as we hold in our possession security for the greater part of the amount."

In the letter of the 19th of July, 1873, which the second Defendant wrote to Mr. *Solomon Volkart* in the course of the subsequent negotiations, he says,—

"Last year I entered into several coffee contracts for coffee delivery, amounting to 40,000 cwts., at different rates, averaging Rs.31. 14*a*. 9*p*. per cwt. f. o. b., and have suffered considerable loss in them. I little expected that the price of coffee would have risen so high in a few days, and that, too, at a figure which no merchants experienced at any time. My friends, as usual with

them, held a large portion of coffee. I was, however, unable to arrange a fixed price, owing to their exorbitant demands, and, although aware of the failures of the *Brazil* and *Java* crop, I little anticipated that price would grow beyond 30 to 31, being the highest limit native coffee was ever raised to; and I forbode the certainty of a recession. With these impressions, I entered into the contracts with your firm. The first few parcels which arrived in the market were met with ready buyers at Rs.30½ per cwt., for ungarbled, besides a payment of Rs.3 per cwt. for expenses of conveyance, there being a marked increase of price daily, particulars of which were duly communicated to your Mr. *Spitteler*. I saw the necessity of paying for the coffee at market price to my parties in order to fulfil my contracts with you, as well as securing the remaining coffee in their hands, who would otherwise have resorted to others, thus entailing on me serious difficulties to bring them round again for future operations, with the view of covering the loss which threatened me on all sides. With these circumstances, I was compelled to receive the advances from Mr. *Spitteler*, who foresaw that if I were to pay penalty for short delivery, as stipulated in the agreement, there would have appeared to my favour Rs.400,000, as compared with market price, against Rs.121,000, being penalty at Rs.3 per cwt., with certain and sure loss to the firm. I, however, considered my credit in your office, the position you hold in the commercial circles, and the difficulties in which you would have been involved, and taking courage in the confidence you repose in me, did all that I possibly could towards the fulfilment of my agreement, trusting entirely, as I now do firmly trust, that, with a little assistance and time from you, I should be able to make up the loss."

It is unnecessary to quote more of this letter. Its whole tone is that of a debtor admitting his liability for the advances in question, but pleading with his creditor for indulgence in consideration of the circumstances in which, and the motives for which, that liability was incurred. The account which it gives of the substance of the transactions is not inconsistent with that of Mr. *Spitteler*, though differing from it in some details, and particularly in the suggestion that, but for the consideration due to the Plaintiffs, and for the prospect of future business, the Defendants

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might have escaped from their contracts of 1872–73 with less loss, by paying the stipulated penalty of Rs.3 per cwt. Looking to that letter and to the other evidence in the cause, their Lordships have no difficulty in coming to the conclusion that not only was the sum of five lacs so advanced to the Defendants as much a debt due from them to the Plaintiffs as any of the ordinary advances made on the purchase account (a fact found by both the Indian Courts, and now hardly disputed), but that the Defendants fully recognised and admitted that liability in 1873. The first suggestion of their contention to the contrary would seem to have been made in their letter of the 26th of November, 1875, when the differences between them and the Plaintiffs, which resulted in the institution of this suit, were at their height.

The Plaintiffs, on being advised of these exceptional advances by Mr. *Spitteler's* letter of the 19th of February, 1873, lost no time in telegraphing their surprise and dissatisfaction, and seem to have contemplated immediate proceedings for the recovery of the amount from the Defendants. Thereupon ensued a long correspondence, and a negotiation, of which it is sufficient to state that it extended over many months, that it was conducted in *India*, on the part of the Plaintiffs, not only by Mr. *Spitteler*, but by Mr. *Kapp*, the manager of the *Bombay* agency, and Mr. *Sigg*, a partner in the European house, who was sent out for that purpose, and that it ended in the execution of the agreement L, on the 2nd of January, 1874. In the course of this negotiation, and on the 25th of October, 1873, the Defendant gave to the Plaintiffs the further security contained in the letter J and the schedule thereto, and various arrangements, of which it is unnecessary to say more at present, were proposed and rejected. Of the final arrangement, embodied in the document L (the construction of which will have to be hereafter more particularly considered), it is now only necessary to state that it proceeded on this basis. The balance due to the Plaintiffs by the Defendants was stated to have been, as on the 1st of July, 1873, Rs.678,012. 10*a*. 1*p*., but was afterwards found to have been only Rs.613,007. 6*a*. 5*p*., as shewn by the account K. Of this balance, Rs.300,000 were to be carried to what was styled "the block account," and the remainder to what was styled "the interest account," by which was meant an account bearing interest.

"The block account" was to carry no interest, and was to be liquidated by returns only on future contracts for produce, such returns to be calculated according to a stipulated scale. This arrangement was to be partly retrospective, in that a sum of Rs.53,056. 13*a.* was to be carried to the credit of the "block account" as for returns on transactions between the 1st of July, 1873, and the 1st of January, 1874, and various sums, amounting to Rs.145,357, were to be credited to the Defendants on the "interest account," as due to them in respect of transactions during the same period. And, lastly, the agreement contained an express stipulation that the balance of interest to accrue due on "the interest account," which was to carry interest on both sides of the account, should be paid in cash on the 30th of June in each year.

The subsequent transactions between the European and the native firms all proceeded on the basis of the arrangement embodied in L. It is unnecessary to examine these in detail. It is sufficient to state that during this last period of the dealings between the Plaintiffs and Defendants their relations seem to have been somewhat strained, but did not become actually hostile before the month of August, 1875. On the 10th of that month the *Cochin* agency wrote a letter to the Defendants, enclosing an account headed "interest account," and demanding payment of a sum of Rs.35,119. 14*a.* 9*p.*, as presently payable under the terms of letter L, for interest due on "the interest account" up to the 30th of June, 1875, and for short proceeds. The Defendants paid on account Rs.10,000 in September, and the further sum of Rs.583. 3*a.* on the 3rd of November, the latter sum being all which, on their mode of stating the account, they admitted to be their due. Their letter remitting this last sum, and the account enclosed in it, are in the record. On the 10th of November, 1875, the Plaintiffs, after giving credit for these sums, and for another small payment of Rs.146. 3*a.* 10*p.*, and admitting some errors in their previous account, reduced the balance, of which they again demanded present payment, to Rs.15,768. 3*a.* 7*p.*

On the same day they wrote another letter to the Defendants, apparently in answer to some offer of produce, in which they said:—

"We beg to say that, as already verbally told your Mr. *Marcar*,

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we cannot entertain the idea of entering into fresh engagements with you, until such time as the balance of interest and short proceeds has been settled satisfactorily, and in accordance with the agreement of 2nd January, 1874. We hereby request you peremptorily to hand over such amount, viz., Rs.16,014. 6*a*. 7*p*., with the interest due up to date to bearer."

The difference between this sum and that demanded in the letter of the same date is the sum of Rs.146. 3*a*., of which the letter admits the receipt by a cheque.

The sum to which the amount in dispute was thus reduced was made up of the sum of Rs.12,789. 1*a*. 11*p*., which, being the difference between interest at 6 per cent. and interest at 9 per cent. upon the balance of "the interest account," the Defendants claimed to be allowed under the provisions of L; and of that of Rs.2979. 1*a*. 8*p*., as to which, though they admitted it to be due for short proceeds, they insisted that it was not then payable, but ought to be carried to their debit in "the interest account." Further correspondence, of a more or less angry character, passed between the parties, till on the 8th of December, 1875, the Plaintiffs wrote to the Defendants as follows:—

"In reply to your letter of the 7th instant, we beg to state that you are well aware that we consider that you have entirely broken your engagements with us for the liquidation of your block account, both in regard to the offers you have made and in carrying out your contracts, and also in regard to the returns, the benefit of which you ought to have given us. In reference to the interest account, you have refused to pay us the interest due us on the 30th of June last, and you have entirely neglected to make any attempt to pay us the large balance due us on this account. Under these circumstances, we are compelled to put the case into Court, and any further discussions will be useless. We must, therefore, decline to take notice, at present, of the tissue of erroneous statements you have put forward in your last letters."

In reply to this, the second Defendant wrote on the same day a letter of remonstrance, denying the imputed breaches of Plaintiffs' agreement, expressing his willingness to go on under it,

shewing that the dispute as to the interest might be settled "by means otherwise than legal," and concluding as follows:—

"Under these circumstances, take notice that I hold you responsible to me for all damages arising from your withdrawal from a contract which up to yesterday I shewed a ready disposition to carry out myself; that from this date I repudiate your further right to fall back upon that agreement; and that I shall bring such action against you for the recovery of compensation for loss sustained by your breach of contract as I may be advised to take."

The plaint was filed on the 10th of December, 1875. It sought to recover the sum of Rs.180,897. 5*a*. 2*p*., the admitted balance on the block account without interest; and the sum of Rs. 224,882. 8*a*. 7*p*., as the balance due on the interest account, with interest on such balance "from the 7th of December, 1875." The balance thus claimed on "the interest account" included the Rs.15,768. 3*a*. 7*p*., of which immediate payment had been demanded in November. The plaint also prayed for a declaration that the instruments of mortgage I and J created and were mortgages of the interest of the Defendants in the properties mentioned in the schedule, and that, if necessary, an account might be taken of what was due by the Defendants to the Plaintiffs on the said mortgages.

The issues finally settled in the suit were:—

(1.) Whether the mortgage instruments of the 21st and 25th of October, 1873, I and J, are valid and subsisting mortgages for the balances that may be found due by Defendants to the Plaintiffs, or for any part thereof.

(2.) Whether, on the 30th of June, 1873, there was a balance of Rs.613,097. 6*a*. 5*p*. due by Defendants to Plaintiffs.

(3.) Whether the Defendants have committed any breach of the agreement of the 2nd of January, 1874, and if not, whether the Plaintiffs are entitled to sue for the balances due on the block account and the interest account.

(4.) Whether Plaintiffs are entitled to bring their suit before submitting to arbitration the dispute as to Rs.12,789. 1*a*. 11*p*. on account of interest.

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(5.) A similar issue as to the before mentioned sum of Rs.2979 1*a.* 8*p.*, the remainder of the sum claimed by the Plaintiffs as a cash payment payable as on the 30th of June, 1875.

The District Judge, Mr. *Wigram*, in a very careful and able judgment, disposed of these issues as follows:—

Upon the 1st, he found that, on the true construction of instruments of mortgage I and J, they and the deeds deposited with them constituted a security for the general balance due from the Defendants to the Plaintiffs.

Upon the 2nd, he found that that balance was, on the 30th of June, 1873, the sum of Rs.613,007. 6*a.* 5*p.*

Upon the 3rd, he found that the agreement of the 2nd of January (L) was, upon the true construction of it, revocable at will by the Plaintiffs, but that, if it were not so revocable, they had failed to prove any breach of it on the part of the Defendants which justified the rescission of it.

As to the 4th and 5th issues, he found that the Plaintiffs were not entitled to sue for the disputed amount of interest until that dispute had been settled by arbitration; but that there was no such objection to the claim for the Rs.2979. 1*a.* 8*p.*, the amount, and the Defendants' liability for it, in some way or another, not being in dispute.

The result of his judgment was that the Plaintiffs were entitled to a decree for Rs.392,990 12*a.* 10*p.*, and to a declaration that, if that amount was not paid within three months, the Plaintiffs were entitled to sell the right, title, and interest of the Defendants in the properties mortgaged to them under the Exhibits I and J, and a decree was made accordingly on the 16th of July, 1877.

From this there was an appeal, and, so far as it related to the 4th issue, a cross appeal, to the High Court, which dismissed both appeals, and confirmed the decree of the Lower Court in its integrity. The judgment of the High Court appears, from the somewhat scanty note of it, to have proceeded, so far as it related to the 3rd issue, upon the supposed proof of actual breaches of the agreement L on the part of the Defendant, and not upon the revocability of that agreement at the will of the Plaintiffs.

In dealing with this appeal their Lordships are relieved from

any further consideration of the 2nd and the 4th issues. What has been already said sufficiently indicates their entire concurrence in the finding of the two Indian Courts upon the former. And there is now no cross appeal against the finding in favour of the Defendants upon the latter.

The questions, therefore, for determination are reduced to the following:—

1st. Whether the finding upon the first issue is correct; a question which depends upon the construction to be put on the document I, since that governs also the effect of J.

2nd. Whether the Plaintiffs were entitled to rescind wholly or in part the agreement embodied in document L, without proof of an actual breach of it by the Defendants sufficient to justify such rescission; and

3rd. If they were not so entitled, whether there is sufficient proof of any such breach.

4th. Whether there is error in the decree, in so far as it declares the Plaintiffs at liberty to sell the mortgaged premises, if the Defendants should not pay the amount decreed within three months.

The contention of the Defendants is that the construction of I is to be governed by the first paragraph in it, which, speaking in the name of the second Defendant, says,—

"As I have been and am now accustomed to contract with you for the supply of country produce and other merchandise, and in the course of these transactions there is frequently a considerable amount of money outstanding to my debit in the way of advances, &c., made upon the contracts, and you very naturally would like some security, I agree to the following propositions, &c."

They insist that this statement, being in the nature of a recital, limits the security to advances made upon contracts for future deliveries of produce, and consequently must exclude from it the advances, to the amount of five lacs, which constitute so large a portion of the balance found due to the Plaintiffs, particularly if *Spitteler's* statement, to the effect that when those advances were made all, or almost all, of the Defendants' contracts with the

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Plaintiffs up to that time had been fulfilled, is to be taken to be correct.

The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

The distinction is recognised and the authorities on this subject collected in the case of *Walsh* v. *Trevanion* (1).

What, then, is the effect of the operative part of this instrument. It says,—

"You shall hold them (the deeds) as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property as a pukha mortgagee would have, only you must agree not to sell any of it until you have given me full twelve months' notice from *the time we shall come to a settlement of accounts to pay up*, or from the time demand shall have been made by you of the amount claimed by you; but if I fail, then you may sell, at my expense, for the best price you can get, any of the properties successively, *till you have satisfied my account current, out of the proceeds*, giving me a strict account of what you sell." And the next paragraph contains the following sentence: "And upon my payment *of all balances due*, you will at once return to me all the documents now deposited with you, and cancel this letter,"

The conclusion which their Lordships draw from the above passages taken together, and examined by the light which the proved relations of the parties at the time throw upon them, is, that the security was intended to cover the general balance that might become due from the Defendants to the Plaintiffs upon all the accounts between them. The words "upon our contracts," which the Defendants insist can only be taken to mean the particular contracts for the delivery of produce referred to in the paragraph in the nature of a recital, do not appear to their Lordships to be necessarily repugnant to this construction. Such

(1) 15 Q. B. (N.S.) 750.

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contracts may have been chiefly in the minds of the parties, but the words themselves are wide enough to embrace all their transactions. And what follows strongly favours the wider construction. There is to be no sale until twelve months after one of two events, viz., a settlement of accounts or a demand. The first case implies a settlement of accounts in order to ascertain the amount due. How could that be ascertained unless all the different accounts were brought into a general account current, and a balance struck thereon? Let it be supposed that "the purchase account," taken alone shewed a large balance due for advances. It can hardly have been the intention of the parties that the property should be sold to pay that balance; if, on the other hand, a balance was due from the Plaintiffs to the Defendants on "the consignment account:" and this explains the following sentence, "if I fail, then you may sell, &c., until you have satisfied *my account current.*" The "account current" would include both accounts. And this intention is made still more clear by the subsequent stipulation that the event on which the deeds shall be returned and the latter cancelled is the payment of *all* balances due. Again, let it be assumed that there was no account open between the parties except "the purchase account." The advances were entered generally to the debit of the Defendants in this account, as on the dates on which they were made, in round sums. Neither this, nor any other account that has been produced shewed what particular advance was made on each particular contract. The five lacs were entered in this account in the same manner as the sums previously advanced. It can hardly have been intended that if it should prove necessary to realize the securities, the account so kept was to be analysed and recast in order to ascertain which of the sums so debited were secured, and which were due upon open account.

The learned counsel for the Defendants have relied upon their refusal to execute S. S. S., one of the abortive proposals made in the course of the negotiations for a settlement between February, 1873 and January, 1874. Whatever may have been the motive of the refusal (and this has not been very satisfactorily proved), parol evidence of what took place a considerable time after the execution of I can hardly affect the construction of that document.

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If it could have any such effect, the evidence of what took place during the long negotiation which ended in the execution of L would, taken as a whole, rather lead their Lordships to the conclusion that both parties were negotiating under the belief and upon the assumption that the whole debt then due was covered by the mortgage securities.

Upon the whole, therefore, their Lordships have come to the conclusion that the Judge's finding on the first issue before him was correct, and that the whole of the before-mentioned sum of Rs.613,007. 0*a*. 5*p*. was, and that the balance of it now recoverable is, secured by the mortgage securities in question.

Their Lordships have now to determine the more difficult question of the construction and effect of the document L.

The contention on the part of the Plaintiffs is that it was revocable at their will, as found by the District Judge. The contention of the Defendants is that, unless rescinded by mutual agreement, or upon a breach of its stipulations by one party justifying its rescission by the other, it was to subsist in full force until the liquidation under it of both the "block" and the "interest" account, or, at all events, of the block account; and further that, if in the events that have happened, the Plaintiffs are entitled to sue for and recover the balance due on "the interest account," they cannot sue for or recover the balance due on "the block account," as to which they have agreed that it was to be liquidated by "returns only."

The circumstances under which the agreement was entered into have already been partially stated. That they afford no ground for the suggestion that the settlement in question proceeded upon the compromise of a doubtful claim, or of a disputed debt, is a conclusion in which their Lordships have already intimated their concurrence. On the other hand, it is clear that, although the arrangement was on the face of it in ease and for the benefit of the Defendants, the Plaintiffs found, or thought they found, their own advantage in it. Had they shewn no forbearance, had they driven the Defendants to extremity, they would probably have lost great part of the large sum then due to them, and they would certainly have lost the advantage which they expected to reap from the employment of the Defendants, who were supposed to have

acquired the command of the market, in their future operations in native produce. The agreement actually made is extremely loose. It fixes no time for its duration, or for the liquidation of the debt. It was, no doubt, purposely left vague upon this point; since one of the grounds on which the second Defendant says he objected to execute S. S. S. was that it bound him to pay a certain amount by a fixed time.

The only specified date from which any inference as to the intended duration of the arrangement can be drawn is the 30th of June, 1875. From that it may fairly be inferred that the parties contemplated dealing on the footing of the agreement up to that time at least. But all beyond that time is left indefinite.

The Defendants, however, contend that it follows, by necessary implication from the terms of the document, that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until the whole debt, or, at all events, that portion of it which was carried to the block account, was liquidated in the manner thereby provided. The passages on which they mainly rely are,—

1st. The statement that "the following conditions have been agreed upon by both parties for the repayment by *P. Marcar* of the money due to *Volkart Brothers.*"

2nd. The provision as to the rebate of interest, which contains these words,—"The same reduction of interest to be made subsequently *until the entire settlement of this account* should *P. Marcar* continue to afford the same satisfaction."

3rd. The provision that "the block account shall be liquidated *by returns only* on all contracts," &c.

Their Lordships are clearly of opinion that the extreme contention of the Defendants that the whole debt was to be repaid under the agreement, which was, therefore, to subsist until that liquidation had taken place, cannot be maintained. The "interest account" stands upon a different footing from the "block account." It was to remain as a debt carrying interest, and that interest was to be paid annually, but no precise stipulation as to the mode of liquidating the principal is to be found in the agreement, unless it is to be inferred from the 5th paragraph that, for the future as for

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the past, sums of money to become due to *P. Marcar* for cash, goods, consignments, &c., were to be carried to their credit. There was, however, no provision for the continuance of the consignment business, which would presumably be the principal source of such credits. Hence, even if the agreement was intended to subsist, and did in fact subsist, until the block account had been liquidated by the returns, there might have remained at that time a balance due on the interest account which the Plaintiffs would have been entitled to sue for and recover.

And it further appears to their Lordships that, as regards the balance due on the "interest account," the utmost that can be implied from the agreement against the Plaintiffs is a covenant not to sue for it until after the 30th of June, 1875.

The question, then, under consideration is reduced to the "block account," and the effect of the words "shall be liquidated by returns only," &c. Now, even as to this account, the provisions are extremely loose, and such as could not be duly worked unless the contracting parties continued to act with the highest good faith, and on a perfect understanding with each other. Nevertheless, they seem advisedly to have abstained from making express provisions either for the continuance or for the due working of the agreement, each trusting to the honour, and, probably, still more to the self-interest of the other. Such an agreement is conceivable if it was intended to endure so long only as both parties desired it to continue. But, for the effectual working of an irrevocable agreement for the liquidation of the block account in a particular way, it would be necessary to imply covenants and obligations for which the parties have failed, apparently from the difficulty of agreeing upon them, to make express provision. For example, no express provision is made as to the extent of the business to be done; the rates at which one party is to offer, and the other to accept, produce; the result upon the letter of the agreement being that, if either were disposed to act unreasonably, he would have the means of postponing the liquidation of the account indefinitely. And if the parties have thus abstained from inserting express provisions for the fair and reasonable working of their supposed agreement, can the Court, which is called upon to enforce it, supply them. Their Lordships are of opinion that it

cannot do so. Among the reasons stated by Lord *Denman*, C.J., in delivering the judgment of the Court in *Aspdin* v. *Austin* (1), are the following, which appear to be particularly applicable to this case; he says:—

"Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect, and it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

These considerations have led their Lordships to the conclusion that the stipulations, even as to the block account, were binding only during the continuance of the arrangement for the conduct of future business, and that on the true construction of the agreement, either party had power, at least after the 30th of June, 1875, to determine it, should it be found, as undoubtedly it was found, to be working unsatisfactorily. They had in this respect the same right as parties under a contract for a partnership at will. Indeed, though they were not strictly partners, their contract was like one between persons engaged in successive joint adventures, the Defendants supplying the produce at a profit to the Plaintiffs, who realized a further profit on its export to *Europe*, and the former undertaking further that a portion of their profits should

(1) 5 Q. B. (N.S.) 671, 684.

J. C. 1880 PALLIKELA-GATHA MARCAR v. SIGG.

be applied in liquidation of their liability on former transactions. Their Lordships conceive that on this construction full effect can be given to all the express stipulations contained in L, and, further, that in the events which have happened the Plaintiffs have not lost their right to sue for and recover the balance due to them either on "the block" or on "the interest account." In truth, had they broken any covenant, express or implied, the remedy of the Defendants would seem to have been an action for unliquidated damages, the measure of which would not necessarily be the balance due on the block account.

Their Lordships' construction of L renders it unnecessary to consider whether, assuming the agreement to be irrevocable, the Plaintiffs have established a breach of it on the part of the Defendants which would justify the rescission of it, a question which, regard being had to the conduct of the parties with respect to the alleged breaches, might not be free from difficulty. Upon the last point their Lordships find that there is no error in that part of the decree which empowers the Plaintiffs to realize their securities in case the Defendants should fail to pay the sum due within three months from the date of the decree. They are of opinion that a sufficient demand, within the meaning of the letter I, was made immediately before the institution of the suit, and was so understood by the Defendants to have been made. Such seems to be the result of the letters of the 8th of December, 1875. The allowance of three months for the payment of the sum decreed to be due to the Plaintiffs on the mortgage securities was therefore in ease of the Defendants. Their Lordships will humbly advise her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Talbot & Tasker.*
Solicitors for the Respondents: *Watkins & Lattey.*

THE NEW BEERBHOOM COAL COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

BOLORAM MAHATA AND OTHERS . . . DEFENDANTS.

J. C.*
1880
Feb. 4, 5, 6.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Construction—Lessor and Lessee—Whether a Covenant to grant Additional Land runs with the leased Land.

In a lease of fifty-one beegahs of land, from the terms whereof it appeared that the lessee's object in taking the said beegahs was that he might quarry therein, erect a factory and carry on mining operations, the lessors covenanted as follows:—

"Within that aforesaid mouzah we will not give a pottah, let give settlement to anybody. If you take possession according to your requirements of extra land over and above this pottah, and we shall settle any such lands with you at a proper rate."

Held, that according to the true construction of this covenant, it related only to such additional land as the lessee or his assigns might require for the purpose of carrying out the object for which the lease was granted.

Quære, whether the lessee could assign the covenant, and whether the purchasers of the adjoining land from the lessors with notice thereof, would be bound thereby.

APPEAL from a decree of the High Court (April 25, 1878) dismissing with costs an appeal of the Appellants against a decree of the officiating Judge of *East Burdwan* (Sept. 27, 1875). The case is reported in Ind. Law Rep. (Cal. Series), vol. v. p. 175.

The suit was brought on the 21st of March, 1875, by the Appellants, against the Respondents *Mahatas* as lessors of the Respondent *Bengal Coal Company*, to obtain specific performance of an alleged agreement to execute a permanent lease of 1247 beeghas 7 cottahs of land of a mouzah called *Mahatadihi*, contained in a pottah or lease of other fifty-one beeghas of the same mouzah, dated the 13th of September, 1858, executed by the Defendants or their predecessors in estate to one *James Erskine*, the predecessor in estate of the Plaintiff company, of which agreement the Plaintiff com-

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C. 1880

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pany claimed the benefit as in the nature of a covenant running with the land originally leased, and contended that the original Defendants were debarred from letting any of their remaining lands to any third person, and were bound to let them, whenever called on, to *Erskine* or to his assignees.

The *Mahatas* (*inter alia*) denied the genuineness of the alleged lease, and contended that, if genuine, they were not bound by it as alleged, it being inoperative, and not enforceable in law, even in favour of *Erskine*, but even if so enforceable that the Plaintiffs had no right in law to enforce it by their suit for specific performance, the rights, if any, of *Erskine* being personal to him and not to his assigns and had not passed to the Plaintiffs as his assignees.

The Judge was of opinion that the lease of 1858 was genuine and bound all the original Defendants, but that the right ought to have been exercised within a reasonable time, and that the suit was barred by limitation, and that the covenant sued on did not run with the land so as to give the Plaintiffs the right to enforce it. He declined to make the Respondent *Bengal Coal Company*, which had taken a lease in March, 1875, of the lands the subject of the suit from the original Defendants, a party to the suit as prayed, on the ground that it had notice of the Plaintiffs' claim when it took that lease, and must, therefore, stand or fall with its lessors.

The High Court on the Plaintiffs' appeal decided to make the Respondent company a party to the suit, and on the hearing of the appeal dismissed the suit as against all the Respondents.

The High Court (*Garth*, C.J., and *McDonnell*, J.), differed from the Judge as to limitation and, declining to decide as to whether the covenant sued on was one which ran with the land, dismissed the suit solely on the ground that, having regard to its peculiar subject-matter, "it was impossible for the Court to ascertain what would be the fair terms of the proposed settle-ment."

The material passage in the judgment of the High Court is as follows:—

"The other questions as to covenants running with the land, and the time during which the agreement was to remain in force, if it were capable of being enforced at all, it will not be necessary for us to decide; because we are of opinion, that upon another

ground, which specially applies to this particular case, the Plaintiffs' suit must be dismissed.

"Their claim is to have the agreement of the 13th of September, 1858, enforced with reference to the whole of the property, of which they took symbolical possession in February, 1875; and as no terms were fixed by that agreement as to rent and bonus, they ask the Court to say, or to ascertain by reference to the registrar, what would be the proper rent and bonus to be paid by them for such additional lands.

"Now, there certainly does appear to be authority for the proposition, that where a contract is made to sell land at a fair valuation, and there is no difficulty in ascertaining what a fair valuation would be, the Court would take the usual means of ascertaining it, and decree performance of the contract accordingly: see *Gaskarth* v. *Lord Lowther* (1); *Sugden's* Vendors and Purchasers [11th Ed.] p. 327. The price or the rent of land might readily and fairly be fixed as between buyer and seller, where the property is of an ordinary character, and its market value generally known or ascertainable. But having regard to the peculiar character of the property in question in this suit, and the uncertainty that must necessarily exist as to its true value, it really is quite impossible for the Court to ascertain by any means in their power, what would be the fair terms of the proposed settlement.

"If the land contains, as both parties now believe it does, a quantity of coal and other valuable minerals, there is no doubt that the fifty-one beegahs which were taken by the Plaintiffs under the pottah of 1858, were sold by the Defendants at a price infinitely below their proper value; and it is also pretty clear, upon the same supposition, that the *Bengal Coal Company* have also made a very advantageous purchase of the land in question.

"The truth is, that the value of land under these circumstances must always be, to a great extent, a matter of guess and speculation; and the Court have, therefore, no means of ascertaining by the ordinary method, what rent or bonus the Plaintiffs should pay."

Cowie, Q.C., and *Macnaughten*, for the Appellant company, contended that it was entitled to a perpetual lease of the lands in

(1) 12 Ves. 107.

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question at a proper rate, and to an injunction restraining the grant of any lease to the *Bengal Coal Company* or any other factory persons, and the latter company from interfering with the possession of the Appellants. Firstly, a contract to sell or let lands at a proper rate is a concluded contract capable of being enforced by the Court. So also a contract entered into for valuable consideration by the owner of a mineral estate, whilst leasing one part of it, not to alienate another part to persons likely to compete with the lessees, is a contract capable of being enforced by the lessee or his assigns against the owner or purchaser with notice: see *Sugden's* Vendors and Purchasers [13th Ed.], p. 238; *Fry* on Specific Performance, p. 95; citing *Milnes* v. *Gery* (1); *Benjamin* on Sales, p. 18.

Secondly, there is no foundation for the proposition of the High Court that the Court will enforce a contract of that kind in the case of agricultural but not of mineral lands. The Court is bound to enforce every concluded contract; the only exceptions being with regard to cases like building contracts requiring continuous supervision, where the Court has no machinery to carry them out. Here the agreement has been part performed, and the evidence shewed that the parties had agreed as to a proper rate, and the Court should do its utmost to surmount any difficulty in the way of enforcing the contract. See, by way of illustration, what is done in partnership cases: *Dinham* v. *Bradford* (2). The Plaintiff of course must shew that it is reasonable that the Court should help him: see *Luker* v. *Dennis* (3); *McLean* v. *McKay* (4); *Jay* v *Richardson* (5); *Birmingham Canal Company* v. *Cartwright* (6). Reference was also made to *Tulk* v. *Moxhay* (7); *Catt* v. *Tourle* (8).

Leith, Q.C., and *Doyne*, for the Respondents, contended that the covenant in the pottah of the 13th September, 1858, was one personal to *James Erskine* alone. It was not intended by the parties to give any other persons a right of suit. Nor did the Appellant company obtain such right by operation of law. The *Mahatas* had not deprived themselves thereby of the right to sell

(1) 14 Ves. 400.
(2) Law Rep. 5 Ch. Ap. 519, 523.
(3) 7 Ch. D. 227.
(4) Law Rep. 5 P. C. 327.
(5) 30 Beav. 563.
(6) 11 Ch. D. 421.
(7) 2 Ph. 774.
(8) Law Rep. 4 Ch. Ap. 654.

or lease the lands as they pleased after *James Erskine* had assigned his interest in the fifty-one beeghas originally leased. The covenant they had entered into was not one which ran with the lands leased, but was collateral thereto. The right of the covenantee, moreover, was limited to such lands as he required for his own purposes under the lease, and did not extend to such lands as he might be able to sell at a profit to third parties. Whether the original lessee only, or his assigns, were entitled to the benefit of the covenant, it only related to such lands as were required for the purposes of the lease. Reference was made to *Thomas* v. *Hayward* (1); *McLean* v. *McKay* (2). Further, it was contended that the covenant was bad on the ground that it created a perpetuity and was contrary to public policy, the Respondents being prevented from making use of or alienating the land to any person for an indefinite period. With regard to the evidence as to agreement in regard to price, that was on the footing of a proposed amicable understanding, and afford no criterion as to a fair price *in invitum*.

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The proper decision of this case depends upon the correct construction of the contract of the 13th of September, 1858, between the *Mahatas* and Mr. *Erskine*. The contract is set out in the record; but it is agreed that the translation made by the Judge may be taken as the correct one. The contract was as follows: "Mouzah *Mahatadihi*, in *Chakla Panchkoti* (*Pachete*), in pergunnah *Shergurh*, is our ancestral rent-paying brahmottur land. Out of this talook the share of one co-sharer, *Ramdhun Mahata*, 2 annas, and that of *Uma Churn*, 1 anna 6 gundahs 2 cowris 2 krants, being in all 3 annas 6 gundahs 2 cowris 2 krants, is (already) a mokurruri of yours. Putting aside that interest, then out of the remainder, forming a kismut, 12 annas 13 gundahs 1 cowri 1 krant, a piece not to comprise crop-bearing land, that is to say, a piece

(1) Law Rep. 4 Ex. 311. (2) Law Rep. 5 P. C. 327.

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of land quite uncultivatable and waste land, a piece to cover in all 51 beeghas, is leased to you under this pottah, for quarrying coal, building stores, for garden, for orchard, for road making, and for other uses. The boundaries thereof are on the east, &c." (describing them). "This land, amounting to fifty-one beeghas within those boundaries, is leased to you at the rent of Rs.25. 8*a.* and a suitable bonus. You are to quarry coal, and till garden and erect building, and so on, and pay the above rent every year and month as per schedule annexed below; and you will carry on your factory according to use and wont. If you default you are to pay interest according to law. The rent is not to be liable to increase or decrease at any time. You will be allowed no deduction in respect of drought or flood, or for uncultivatableness. You will build a factory according to any plan you choose, and possess the same. Within that aforesaid mouzah we will not give a pottah to any factory person;" that is to say, "we shall not let (literally, give settlement) to anybody." It is not necessary with reference to their Lordships' view of the case to decide whether this really was a contract not to give a pottah to any person, or a contract not to give a pottah to any other factory person. The Plaintiffs, however, in their plaint have treated it as a contract not to give a pottah to any person whatever. If so, that might render the contract bad in restraint of alienation; but it is unnecessary to determine that question. Then it goes on:—"If you take possession," or more literally "take possession," and then, "according to your requirements, of extra land over and above this pottah, and we shall settle any such lands with you at a proper rate. Thereat we make no objection."

It is contended on the part of the Plaintiffs that this was a contract which Mr. *Erskine* or his heirs could assign to any one, and that the person to whom he assigned it would be at liberty to require the *Mahatas* to settle the land with them at a reasonable rate. It may be assumed for the present purpose that Mr. *Erskine* had the power to assign the contract to any one; and it may also be assumed that the *Bengal Coal Company*, as the purchasers from the *Mahatas* of the adjoining land, with notice of the contract, were also bound by it. But then the questions arise, whether it was the intention that *Erskine* or any one to whom he might

assign it should be at liberty to take the whole of the mouzah for any purpose whatever, whether for quarrying coal or not; and whether the *Mahatas* bound themselves to grant to *Erskine* all the cultivatable as well as uncultivatable land in the mouzah. The construction which the Plaintiffs have put upon the contract is, that *Erskine* was entitled, at any time and for any purpose, to take possession and to compel the *Mahatas* to grant him a lease of the whole of the residue of the mouzah at a reasonable rate. The words are: "If you take possession, according to your requirements, of extra land." Now what is the meaning of the words—"according to your requirements?" Does it mean "according to your requirements for any purpose, or according to your requirements having regard to the lease of the fifty-one beeghas and the purpose for which it was granted?" Assuming that the words, "You are to quarry coal," and "You are to build a factory," were not obligatory, still they shew that the object of *Erskine* in taking the lease was that he might quarry within the fifty-one beeghas; that he might erect a factory, and carry on mining operations. Then comes the stipulation, which must be read in the sense that if, using the fifty-one beeghas for the purpose for which you have taken them, you should require adjoining land as incidental to the lease, then we agree to grant it you at a reasonable rate. Could *Erskine* have assigned the lease of the fifty-one beeghas to one person, and then sold his interest with regard to the adjoining land to another person, so as to separate the two? Their Lordships are of opinion that he could not. It appears to them that the true construction of the contract was, that if *Erskine* or his assigns should require additional land for the purpose of carrying out the objects for which the lease was granted, then the *Mahatas* would settle as much of the adjoining land with them as might be necessary for the purpose of such requirements. It is unnecessary to make any distinction between the waste land and the cultivatable land in that view of the construction, because the land was not taken possession of by the company as requiring extra land for the purposes of the lease, but merely for the purpose of selling it. The *Beerbhoom Company*, to whom *Erskine* had assigned the agreement, ask the Court to compel a specific performance of it, because they had entered into a contract of sale to the *Bengal Coal Com-*

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pany for a sum of money which they say would give them a profit of Rs.26,000 odd. They say in their plaint, "Having got this agreement, we afterwards negotiated with the *Mahatas* for a lease of the adjoining land (not that the *Mahatas* agreed to grant a lease) upon the terms that we were to pay Rs.1. 8*a.* for the waste land, and Rs.3 for the cultivatable land." And then they ask the Court to grant them specific performance of the agreement by compelling the *Mahatas* to grant them a lease at those rates; or if the Court will not order a lease at those rates, then at such rates as the Court shall think reasonable.

Their Lordships are of opinion that the Judge of the First Court came to a correct conclusion upon the 6th issue, on which he found that, apart from the fifty-one beeghas, the assignees could not compel the *Mahatas* to grant a lease of the remaining lands of the mouzah. Their Lordships are not bound by, nor do they concur in, the reasons which the learned Judge gave for that decision. The High Court affirmed the decision, but not for reasons which their Lordships consider to be correct. They affirmed it upon the ground that it was impossible to determine what was a reasonable rate. Their Lordships cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome. Their Lordships therefore, without concurring in the reasons of either of the Lower Courts, have come to the conclusion that the *Beerbhoom Company* were not entitled to compel the *Mahatas* to settle the remainder of the land at reasonable rates, and they will therefore humbly advise Her Majesty that the decision of the High Court be affirmed, with the costs of this appeal.

Solicitors for the Appellant: *Lawford, Waterhouse, & Lawford.*
Solicitors for the Respondents: *Baileys, Shaw, & Gillett.*

MONIRAM KOLITA . . . . . PLAINTIFF;

AND

KERRY KOLITANY . . . . . DEFENDANT.

J. C.*
1879
Nov. 28, 29.
1880
March 13.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Law — Hindu Widow — Chastity — Forfeiture of deceased Husband's Estate.

Under the Hindu law, as administered in the *Bengal* school, a widow who has once inherited the estate of a deceased husband is not liable to forfeit that estate by reason of unchastity.

APPEAL preferred in pursuance of an Order in Council (May 13, 1875), from a decree of the High Court (June 2, 1873), passed in accordance with the decision of a majority of a Bench consisting of ten Judges, dated April 9, 1873, which decree reversed on special appeal, the decision of the Deputy Commissioner of *Sibsagur*, in the Province of *Assam* (June 1, 1870), and restored that of the Munsiff of *Golazhat* (March 24, 1870). The facts of the case, as to which there was no question, were as follows :—

Ghinbora and *Atma*, both deceased, were Hindu brothers, and lived within the jurisdiction of the *Assam* Courts above mentioned, and were subject to the law of the *Bengal* school.

The Appellant, Plaintiff below, was the son of *Atma*. The Respondent, Defendant below, was the widow of *Ghinbora's* son, *Ghindhela*, who died about three or four years before the institution of the suit, leaving no issue.

On his death, the Respondent, as his widow and heiress, inherited the lands in suit consisting of 23 beegahs, 3 cottas, and 4 lochas and obtained a pottah for the same from the Collector.

According to the ordinary law of the *Bengal* school the Appellant, on the Respondent's death, would, if then alive, be entitled to inherit the land in suit, as next heir of her husband. Some time after her husband's death, the Respondent began to live

* *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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with a man, by name *Mohana*, as her paramour, and had a child by him.

The suit was instituted on the 30th of January, 1870, by the Appellant, to recover the lands in suit from the Respondent. The plaint did not charge unchastity, but claimed the lands as ancestral lands to which the Plaintiff was entitled.

The Respondent claimed them by her written statement as having belonged to her husband, and being since his death in her possession.

The Munsiff of *Golazhat* decreed in favour of the Plaintiff for half of the disputed land with costs. The terms of the order contained in the Munsiff's judgment, on which the decree was founded, were as follows:—

Ordered that at present half of the disputed land, together with costs, be decreed; that the Defendant do hold possession of the remaining half during her lifetime; that she shall not be competent to alienate it by sale or gift, and that as the Defendant has no issue by the deceased *Ghindhela*, her son by another husband cannot be the heir to the deceased.

The Deputy Commissioner in appeal decreed in the Plaintiff's favour for the whole of the disputed land.

The High Court (*Bayley* and *Dwarkanath Mitter*, JJ.), expressed their concurrence with the judgment of the Deputy Commissioner, but in consequence of a previous conflicting decision of another Divisional Bench they referred the case to a Full Bench as to the two questions set out in their Lordships' judgment; viz.,—

1st. Whether, under the Hindu law, as administered in the *Bengal* school, a widow who has once inherited the estate of a deceased husband is liable to forfeit that estate by reason of unchastity; and,

2nd. Whether the forfeiture, if any, is barred by Act XXI. of 1850.

The reference was made with the following remarks by Mr. Justice *Dwarkanath Mitter*:—

"The first question we have to determine in this case is whether, under the Hindu law as administered in the *Bengal* school, a widow who has once succeeded to the estate of her deceased husband is liable to forfeit that estate by reason of unchastity.

"In order to arrive at a satisfactory solution of this question, we thought it proper to consult some learned Pundits in Court; and we accordingly summoned Pundit *Jesur Chunder Vidyasagur*, Pundit *Mohesh Chunder Nyaruttun*, Officiating Principal of the *Calcutta* Sanscrit College, Pundit *Bharut Chunder Shiromony*, Professor of Hindu Law in the said institution, and Pundit *Taranhath Turkobachusputee*, Professor of Grammar and Rhetoric in the same. Pundit *Jesur Chunder Vidyasagur*, however, could not attend on account of ill health. The other three Pundits appeared, and orally stated unanimously that the question under our consideration ought to be answered in the affirmative, each giving his separate opinion and the authority on which it rested, also orally.

"In this opinion we entirely concur. All the ancient rishis, or sages, whose words are recognised as authorities in the different schools of Hindu Law current in the country, appear to be unanimous in holding that an act of unchastity is one of the gravest delinquencies of which a woman can be guilty, and hence it is that we find in the Hindu shasters so many stringent provisions for its prevention. 'Day and night' (says *Menu*), 'must women be held by their protectors in a state of dependence; even in lawful and innocent recreations, being too much addicted to them, they must be kept by their protectors under their own dominion:' *Colebrooke's* Digest, bk. iv., v. 3. 'Through independence' (says *Narada*), 'even women born of noble families would swerve from their duty; hence the Lord of created beings has established their perpetual dependence:' *Colebrooke's* Digest, bk. iv., v. 4. 'Let her father' (says *Yajnavalkya*), 'guard a maiden; let her husband guard a married woman; but let her son guard her in age; or on failure of these, let their kinsmen protect her. In no instance is the independence of a woman allowed:' *Colebrooke's* Digest, bk. iv., v. 6. 'Women' (says *Menu* again), 'must above all be restrained from the smallest illicit gratification, for not being thus restrained they bring sorrow on both families: let husbands consider this as the supreme law ordained for all classes; and let them how weak soever diligently keep their wives under lawful restrictions; for he who preserves his wife from vice, preserves his offspring from suspicion of bastardy, his ancient usages from neglect, his family from disgrace, himself from anguish, and his

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duty from violation:' *Colebrooke's* Digest, iv., v. 12. 'If the husband's family be extinct' (says *Narada* again), 'or the kinsman be unmanly or destitute of means to support her, or if there be no sapindas, a kinsman on the father's side shall have authority over the woman. But if the kindred on both sides fail, the king is considered as the protector of the woman; he shall guard her, and shall chastise her if led away from the path of virtue:' *Colebrooke's* Digest, bk. iv., v. 13. 'Therefore guard wives' (says *Paithinasi*), 'lest mixed classes should spring from them:' *Colebrooke's* Digest, bk. iv., v. 10. 'By violating their obligation of fidelity to one only husband' (says *Harita*), 'and by receiving the embraces of a stranger, vicious women confound families; for a son begotten by an adulterer while the husband is alive is a cunda, or after his death, a golaca: therefore let the husband guard his wife from the assaults of lust. If she be lost through vice, the honour of the family is forfeited; if that be lost, the pure succession of progeny is lost; through that loss the sacraments of duties and of manes are destroyed, those sacraments being destroyed, duty fails; duty failing, the husband's soul is lost; and his soul being lost, everything is lost:' *Colebrooke's* Digest, bk. iv., v. 8.

"Whether the texts above referred to, so far as they relate to the dependence of women, are as liberal as they ought to have been, and whether the Courts of Justice in this country, constituted as they are at present, are bound to carry them out in their integrity are questions which we need not pause to discuss. It is sufficient for the purposes of our decision to say that they are in full unison with the feelings of the Hindu community in general, and that the social status and privileges of Hindu women are still ordinarily determined and regulated by them. But be this as it may, there can be doubt whatever that those texts are eminently fitted to give us a clear idea of the general spirit of the Hindu law, so far as it relates to the question of chastity in Hindu women; and we are therefore justified in referring to them as a valuable guide in the present discussion, which is intimately connected with that question. Such a course of procedure is fully warranted by the decision of the Privy Council in the case of *Mussamut Thakoor Deyhee* v. *Rai Baluk Ram* (1). One of the

(1) 11 Moore's Ind. Ap. Ca. 139, see p. 173.

questions raised in that case was whether under the Hindu law as administered in the *Benares* school, property inherited by a woman becomes her stridhan; and a passage of the Mitakshara, the highest authority recognised in that school, directly supporting the affirmative of this proposition, was strongly relied upon in the course of the argument. But their Lordships declined to act upon that passage; and one of the reasons assigned by them was that it was inconsistent with the general spirit of the Hindu law as shewn by the numerous texts declaring the perpetual dependence of women.

"With these preliminary observations let us proceed now to the direct examination of the question we have to deal with in the present case.

"We think it scarcely necessary to remark that the estate of a widow under the Hindu law is one of a very peculiar character. To compare it with a life estate, or with any other estate known to the English law, would be to misunderstand its nature completely; and if authority is needed to support this proposition, we have only to refer to the remarks made by the Privy Council in the case of *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1). It is true that the widow is allowed to succeed to the estate of her deceased husband as his heiress-at-law; and it is also true that she is allowed to represent that estate fully, so long as her right to hold it continues to exist. But her dominion over it is rigorously confined within certain defined limits, beyond which she has no power to go; nor is it allowed to descend to her heirs after her death. As 'half the body' of her deceased husband she takes his property in default of male issue, but being not more than half her power to deal with it is anything but that of an owner in the true sense of the term. Indeed, according to the true theory of the Hindu law, she is nothing more than a trustee for her life for the soul of her deceased husband, if we may use the expression, 'For women the property of their husbands' (says *Vyasa*) 'is intended only for use; let them not make waste of it on any account.' In commenting upon this passage the author of the Dayabhaga says (c. xi. s. 1, v. 61): 'Even use should not be by wearing delicate apparel and similar luxuries. But since a widow bene-

(1) 8 Moore's Ind. Ap. Ca. 500, see p. 550.

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fits her husband by the preservation of her person, the use of property sufficient for that purpose is authorized. In like manner, since the benefit of the husband is to be consulted, even a gift or other alienation is permitted for the completion of her husband's funeral rites.' Accordingly the author says, 'Let not women make waste.' Here, 'waste' intends expenditure not useful to the owner of the property. It is clear from this passage that every use made by a Hindu widow of the estate inherited by her from her deceased husband, which is not conducive to his spiritual welfare, is, under the Hindu law current in the *Bengal* school, an unauthorized act of waste. And the acknowledged founder of that school goes to the length of declaring that she is allowed to use that estate for the purposes of her maintenance, not because she has any independent right to do so, but because by preserving her person she confers a benefit upon his departed spirit. If this is not the true picture of the trustee character of the widow it is difficult to make out what trusteeship means.

"It should not be supposed that the above provisions were intended by their framers to serve as mere moral precepts which the widow is at liberty to obey or to disobey at her pleasure: on the contrary, the utmost precaution appears to have been taken by them to secure their strict enforcement. We have already shewn that according to the Hindu law, women are deemed to be never fit for independence, and the widow in possession of her husband's estate is no exception to the general rule. 'When the husband is dead' (says *Narada*) 'his kin are the guardians of his childless widow. In the disposal of the property and care of her person, as well as in her maintenance, they have full power.' The authority of this text is distinctly recognised in the Dayabhaga, which says: 'In the disposal of property by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons:' Dayabhaga, c. xi., s. 1, v. 64.

"In order to complete this part of the argument, let us pause for a moment to compare the widow's estate with that of a male heir under the Hindu law. It is true that in the latter case also the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right of succession, but after the claimant is once found competent to satisfy the requirements of

that test the property is absolutely made over to him as his own in the fullest sense of the term : no effective restriction whatever is put upon his right of enjoyment, and the estate is allowed after his death to descend to his heirs, and not to those of the original owner. The only exception to this rule is to be found in the case of ancestral property under the law current in the *Benares* school, but the principle upon which that exception is based has nothing whatever to do with the present discussion. Nor is it necessary to go very far in order to find out the reason of this distinction between male and female heirs. Women are incapacitated by their sex from performing the ceremony of parvana sraddh, which constitutes as it were the very corner stone of the Hindu law of inheritance; and hence it is that we meet with a general tendency in that law to exclude them from the category of heirs. In the few cases in which women are allowed to succeed, they are allowed to do so upon the authority of special texts, and not upon the general principle by which the law of inheritance is regulated. 'Accordingly,' says the author of Dayabhaga (c. xi., s. 6, v. 11), '*Baudhayana*, after premising 'a woman is entitled,' proceeds, 'not to the heritage; for females, and persons deficient in an organ of sense or member are deemed incompetent to inherit.' The construction of this passage is a woman is not entitled to the heritage. But the succession of the widow and certain others (mother, daughter, &c.) takes effect under certain express texts without any contradiction to this maxim. The case of the widow affords a curious illustration of the tendency above referred to. So far as the original writers on Hindu law are concerned, it appears that they were by no means unanimous in recognising her right of succession, as may be seen from the numerous contradictory texts quoted on the subject both in the Mitakshara and in the Dayabhaga; and, indeed, if we were to guide ourselves solely and exclusively by those texts it would have been extremely difficult for us to come to any satisfactory solution of the question one way or the other. Among the commentators the author of the Mitakshara is of opinion that the widow is entitled to inherit only when the family is separate. The author of the Dayabhaga repudiates the distinction between joint and separate family, but he also

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is obliged to admit that she takes under the authority of special texts, and that it is by those texts that the nature and extent of her right are to be determined and regulated.

"It should not be supposed that the above view of a Hindu widow's estate is opposed to the Full Bench decision in the case of *Gobindmani Dasi* v. *Shamlal Bysak* (1), in which it is held that a widow is competent to sell her so called life interest in the property left by her husband. We do not wish to express any opinion as to the correctness or otherwise of this decision. It might possibly be supported upon the ground that such a sale is nothing more than mere anticipation of the proceeds, which the widow could have realised from the estate if she had kept it in her own possession. But there is nothing in that decision to support the contention that the proceeds, thus anticipated, can be used by her for any purpose not authorized by Hindu law,—that is to say for any purpose not conducive to the spiritual welfare of her deceased husband. The Hindu Law it should be observed does not, at least in *Bengal*, recognise any distinction between the moveable and the immoveable portions of the estate, nor does it recognise any distinction between the *corpus* of that estate and its profits. That these profits do not become her stridhan, or peculiar property, in any sense of the term, is manifest from the fact that their residue which remains after her enjoyment of the estate, is allowed to go to the heirs of her husband and not to those of her stridhan. 'Therefore,' says the author of the Dayabhaga (ch. xi. s. 1, v. 59) 'those persons who are exhibited in a passage above cited as the next heirs on failure of prior claimants shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom the succession had vested. At such time (when the widow dies, or when her right ceases) the succession of daughters and the rest is proper.' Every expenditure incurred by a Hindu widow, which is not beneficial to the deceased owner, is, as we have already shewn, an unauthorized act of waste within the definition of that term as given in the Dayabhaga; and the word 'use' in the above passage puts it beyond all doubt that the rule

(1) Beng. L. R. Sup. Vol. 48.

is just as much applicable to the increment of the estate as it is to the *corpus* of it. As for the absence of any distinction between the moveable and the immoveable portions of the estate we have only to refer to the decision of the Privy Council in the case of *Bhugwandeen Doobey* v. *Myna Baee* (1). That decision was passed, it is true, with special reference to the Hindu Law administered in the *Benares* school, but it may easily be shewn upon precisely similar grounds that the same rule holds good in *Bengal* also; see, also, the case of *Cossinaut Bysack* v. *Hurroosoondry* (2), which was a *Bengal* case. Suppose for instance that a widow sells her so-called life interest in her husband's property for a lac of rupees, the sale may be allowed to stand on the authority of the Full Bench ruling in question. But can it be contended that she would be entitled to use this lac of rupees in any manner she thinks proper, or that the male heirs of her husband, who have 'full powers over her in the disposal of her property, in the case of her person and in her maintenance under the express provisions of the Hindu law, would not be competent to take any legal steps to restrain her from 'wasting' the amount? It may well be that the Courts of Justice in this country, constituted as they are at present, are not in a position to compel a Hindu widow to use her husband's property for the benefit of his soul,—although we are far from saying that a Hindu king would not have been bound to do so to the fullest extent, he being expressly required by the Hindu Shastras to act as her guardian, and to chastise her if led away from the path of virtue, as may be seen from one of the texts already quoted by us;—but those Courts are bound to interfere in cases of waste; and it is in obedience to this general obligation that so many suits, instituted by reversioners to set aside acts of waste committed by widows, have been, and are still being, entertained by them. Suppose then that a reversioner brings an action upon the ground that the widow is about to spend a large sum of money, derived by her from the profits of the estate, for a purpose not authorized by law, and suppose that his prayer is that an injunction should be issued commanding her not to spend it for that purpose, can the Court refuse to grant the injunction, if the

(1) 11 Moore's Ind. Ap. Ca. 487.
(2) Vyavastha Darpana, 97; S. C. 2 Morl. Dig. 198.

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ground upon which it is asked for is made out? This question we apprehend, must be answered in the same way as if the threatened waste had related to a portion of the corpus of the estate, unless we are prepared to hold that, although we are bound to administer the Hindu law when the widow claims to succeed to the property of her deceased husband, we are not bound to administer that law when the dispute is as to the nature of her right, and the use she is entitled to make of it. We are aware that it has been held in some cases that the widow is not under any legal obligation to render accounts to the reversioner. We do not wish to express any opinion about the correctness of these decisions one way or the other. It may even be granted for the sake of argument that the widow is not bound to make good to the estate any sums already misspent by her. But there is no authority of any kind on the strength of which it can be held that she is the absolute mistress of the proceeds of that estate, or that the reversioner is not entitled to take any legal steps in order to prevent her from using those proceeds for a purpose other than that sanctioned by the Hindu law.

"Such then being the nature of the estate inherited by a Hindu widow, every act done by her the effect of which is to incapacitate her from using that estate for the only purpose for which she is entitled to use it operates as a cause of forfeiture. The question is therefore, reduced to this—Is unchastity an act of this description? Looking at this question from a purely Hindu point of view, we feel no hesitation in saying that the answer to it ought to be in the affirmative.

"'Women' (says *Menu*, the highest and most respected of all the Hindu legislators), 'have no business with the texts of the Veda; thus is the law fully settled; having therefore no evidence of law and no knowledge of expiatory texts sinful women are as foul as falsehood itself, and this is a fixed rule:" *Colebrooke's* Digest, book iv. v. 25. The following passage of *Vyasa*, however, which is cited by *Rughoo Nunduna* (one of the acknowledged authorities in the *Bengal* school), in connection with this very subject, and which will be more specifically referred to in a subsequent part of our judgments, is still more explicit on the point: 'O *Arundhuti!* gifts, fastings, religious and other good acts of an

unchaste woman are vain; their religious merits also, spotless beauty, are fruitless. Those wicked women, who by the commission of adultery deceive their husbands, lose from that time the fruits of religious acts and are doomed to hell.'

"It is clear, therefore, that an unchaste woman not only causes 'the loss of her husband's soul,' but she is totally incompetent to redeem it afterwards, inasmuch as every act done by her subsequent to the loss of her chastity must be necessarily destitute of all religious efficacy whatever. How then can it be contended that such a person is entitled to retain possession of her husband's estate when she has by her own act reduced herself to a condition which renders her absolutely unfit to use that estate for the only purpose for which it was made over to her. As half the body of her deceased husband, she took it as a trustee for the benefit of his soul; but if she is no longer in a position to fulfil her duties as such trustee, the trust property must be taken away from her as a matter of course.

"Nor is the above conclusion wanting in express authority to support it. That an unchaste widow has no right to succeed to the estate of her deceased husband is, we believe, a proposition of Hindu law beyond all dispute. The Mitakshara, which is respected as a very high authority more or less in every part of *Hindustan*, expressly lays down:—'Therefore it is a settled rule of law that a wedded wife being chaste takes the whole estate of a man who, being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue.'—Mitakshara, ch. ii. s. i. v. 39. The discussion in v. 18 is significant. In that verse the author repudiates the claim of a widow who is appointed to raise up issue for her husband, and he bases his opinion on a text of *Vridha Menu*, which expressly declares that a chaste widow alone is entitled to succeed. It is worthy of remark that a mere appointment to raise up issue cannot in the absence of anything done by the widow in pursuance of that appointment, affect her chastity in any manner whatever, and yet the bare likelihood of her keeping such an appointment and thereby losing her chastity is considered as a sufficient ground for her disinherison. It is clear, therefore, that in the opinion of the author of the Mitakshara, the widow who is to succeed to the estate of her

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deceased husband must remain under a perpetual obligation to preserve her chastity; and this inference is not only confirmed by the very wording of the text of *Vridha Menu*, upon which he relies, but also by vv. 37 and 38, in which he says that the widow who is suspected of incontinence must be excluded, and that she who is not supposed likely to be guilty of that offence is alone entitled to take the wealth of her deceased husband.

"It is true that there is no special discussion on this point in the Dayabhaga, but the reason of this omission is obvious. The authority of the Mitakshara, it should be remembered, was at one time supreme even in *Bengal*, and as the author of the Dayabhaga did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them. It is for this reason that the Mitakshara is still regarded in the *Bengal* school as a very high authority on all questions in respect of which there is no express conflict between it and the works prevalent in that school, as may be seen from the remarks made by the Privy Council in the case already referred to. But be this as it may, it seems to be clear upon the authority of the very texts relied upon by the author of the Dayabhaga, in order to establish the widow's right of succession, that both the accrual and the continuance of that right are absolutely dependent upon the preservation of her chastity. The very first text quoted by him is one from *Vrihaspati*, which says: 'In scripture, and in the code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing with him the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives. How, then, should another take his property while half his person is alive? Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsman, a father, a mother, or uterine brother be present. Dying before her husband a virtuous wife partakes of his consecrated fire, or if her husband die before her she shares his wealth, this is a primeval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly half-yearly and other funeral repasts. With presents to his manes, and by pious

liberality, let her honour the paternal uncle of her husband,' &c. —Dayabhaga, ch. xi. s. i. v. 2.

"The word 'virtuous' in the above passage is a mis-translation. The original contains two words, 'potibrota' and 'shadhi'; the former meaning devoted to the broto, or ceremony of promoting the happiness of her husband; the latter, chaste. According to this text it is clear that it is the chaste widow alone who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband, and, therefore, entitled to succeed to his estate after his death, in default of male issue. It is the chaste and not the unchaste wife who is regarded 'in the Hindu scriptures, in the code of Hindu law, and in the popular practice prevailing among the Hindus,' as half the body of her husband; and it is she, and she alone, who is entitled to partake of his consecrated fire, to offer his monthly, half-yearly, and other funeral repasts, as well as to those pious acts of liberality which are necessary for the salvation of his soul. An unchaste woman is even as a corpse, for every act done by her is, in the eye of the Hindu law, absolutely null and void so far as religious efficacy is concerned: and we might here refer to the case of *Sayamalal Dutt* v. *Saudamini Dasi* (1), in which it was expressly held that an adoption made by an unchaste widow is invalid, notwithstanding that it was made in pursuance of a permission given to her by her husband.

"The next text to which we wish to refer is that of *Vridha Menu*, which says: 'The widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.' Who *Vridha Menu* was, or whether he was a real or a fictitious personage, it is needless for us to inquire. It is sufficient to say that the above passage is recognised by the author of the Dayabhaga as one of the texts upon which the widow's right of succession is based (see Dayabhaga, ch. xi. s. i. v. 7); and that it shews, beyond the possibility of doubt, that the preservation of her chastity is a condition precedent to the widow's capability to offer oblations to her deceased husband, and, therefore, to her right to take his estate. The third text is one of *Vyasa*, it says: 'After the death of her husband let a virtuous woman observe

(1) 5 Beng. L. R. 362.

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strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods, and especially the adoration of *Vishnu*. Practising constant abstemiousness, she should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys her husband, though abiding in another world, and herself to a region of bliss.'—Dayabhaga, ch. xi. s. i. v. 43. This is the path of duty which the widow is enjoined to follow throughout her life, and it is only by steadily persevering in that path that she can promote the spiritual welfare of her husband. It is to be borne in mind that her capacity to promote such welfare arises only on the date of her widowhood, and not before, as may be seen from v. 43 of s. i., ch. xi. of *Colebrooke's* Dayabhaga: and it is for the purpose of enabling her to secure the attainment of this object, as well as for another to which we shall presently refer, that his estate is made over to her. Accordingly the author of the Dayabhaga after citing the texts of *Vyasa* above quoted, says: 'Since by these and other passages it is declared that the wife rescues her husband from hell; and since a woman doing improper acts through indigence causes her husband to fall into a region of horror; therefore the wealth devolving upon her is for the benefit of the former owner: and the wife's succession is consequently proper.'—Dayabhaga, ch. xi. s. i. v. 44. It will be seen that the author of the Dayabhaga repeatedly calls the deceased husband the owner of the estate, notwithstanding the widow's succession, she being in possession of it merely as half his body, and solely for his benefit. It is clear, therefore, that according to the author of the Dayabhaga there are two reasons for allowing the widow to succeed to the estate of her deceased husband, namely, first, because she can rescue him from hell, by living in the mode prescribed by the Hindu Shastras; and secondly, because she might cause his soul to fall into a region of torment by doing improper acts through indigence. Both these reasons, however, presuppose the 'strictest observance of her duty of continence;' and it is for this reason that such observance has

been put forward by *Vyasa* as the very first condition which she must satisfy, in order to fulfil the requirements of her position. The last text we wish to refer to is one of *Cetyayana*, cited in the following passage of the Dayabhaga: 'But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it.' Thus *Cetyayana* says: 'Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death.'—Dayabhaga, ch. xi. s. i. v. 56.

"This passage shews clearly, not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'preserving unsullied the bed of her lord.' The participial form of the word 'preserving,' *i.e.*, continually preserving, which is also the form used in the original (palayanti), proves conclusively that the injunction is one in the nature of a permanently abiding condition, which the widow is bound at all times and under all circumstances to satisfy; and the right of enjoyment conferred upon her being expressly declared to be subject to such a condition, every violation of it must necessarily involve a forfeiture of that right. It has been already shewn that the widow's right of succession is dependent solely and exclusively on the authority of special texts, and it would not certainly lie in her mouth to say that she is entitled to enjoy that right without being bound by the conditions which those very texts have imposed upon her. It has been said that the same reasoning would apply with equal force to the other portion of the text which requires her to abide with her venerable protector. But this is not a separate condition by itself. It is, in fact, merely ancillary to the preceding condition, namely, that of preserving unsullied the bed of her lord, and is simply as a means to an end. Indeed, it was at one time a matter of grave doubt whether a widow who has voluntarily left the protection of her husband's kinsmen is entitled to retain his estate. The question was ultimately settled in the affirmative by the Privy Council. But the decision in the case of *Cossinaut Bysack* v. *Hurroosoondry* (1) was expressly put upon the ground that the widow in

(1) Vyavastha Darpana, 97; S. C. 2 Morl. Dig. 198.

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that particular case had not changed her residence for unchaste purposes. This decision lends considerable support to our view, though in an indirect way; for if, as has been argued in this case, a widow who has once succeeded to the estate of her deceased husband is not liable to forfeit that estate by reason of unchastity, neither the Pundits who were consulted in that case, nor the Lords of the Judicial Committee by whom it was ultimately disposed of, would have put their opinions upon the narrow ground above referred to.

"The other authorities current in the *Bengal* school are still more explicit on the point. *Sreekissen Turkolunkar*, whose authority has been held in some cases to be superior even to that of the author of the Dayabhaga, expressly declares 'shadi,' chaste, 'otherwise the right ceases.' The word 'ceases' in the above passage stands for the word nibritti (निवृत्ति) in the original; and as this last-mentioned word clearly means the extinction of some pre-existing thing, it seems to be clear that, in the opinion of *Sreekissen Turkolunkar*, loss of chastity is a cause of forfeiture. *Rughoo Nunduna*, also, the author of the Dayatatwa and of several other works which are regarded as high authorities in the *Bengal* school, appears to be of the same opinion. After citing the text of *Catyayana* above referred to, he says, 'Shadhi, not unchaste. Therefore, it is said in the story of *Punnaka* in the Hurrivansa: "Oh, *Arundhuti*, gifts, fastings, and other virtuous acts of an unchaste woman are vain, &c, &c."' This passage has been already quoted *in extenso* in an earlier part of this judgment, and we have only to observe in this place that the author of the Dayatatwa refers to it for the purpose of shewing that the Hindu law insists upon the virtue of chastity as a *sine quâ non* to the widow's enjoyment of the property inherited by her from her husband; because the moment she commits an act of unchastity she becomes absolutely incompetent to confer any spiritual benefit upon her deceased husband, or, as the text itself says, she 'loses from that time the fruits of religious acts, and is doomed to hell.' Lastly, *Juggernath Turkopunchanun*, one of the most modern authorities of the *Bengal* school, expressly says: 'Since a woman has not yet performed the duties of widowhood and the like, how can she have a title to the inheritance immediately after the death

of her husband? She has an immediate title, because she is disposed to perform those duties. But afterwards, if her propensities happen to change, she forfeits the right she had fully possessed:' *Colebrooke's* Digest, book v. v. 409. And again, in v. 477 of the same book: 'The childless widow, considering that the several property of a woman may be resumed (v. 405) if she do not preserve unsullied the bed of her lord, the legislator propounds this text. This maxim being true in respect of the several property over which a woman has exclusive dominion, the same is equitable in respect of an estate devolving on her by the failure of male issue.'

"It is further to be observed that the Hindu law goes to the length of declaring that a woman who is guilty of unchastity is liable to forfeit even her stridhan or peculiar property. Thus *Narada* says: 'Among brethren, if one die naturally or civilly without male issue, the rest may divide his property among themselves, excepting the wealth of his wives, and shall support them until they die, provided they preserve unsullied the bed of their husbands. But from others the heirs may resume their exclusive property': *Narada Sanhita*, p. 21; *Colebrooke's* Digest, book v. v. 405. *Catyayana* also lays down the same rule: 'But a wife who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed, is held unworthy of the property above described:' *Colebrooke's* Digest, book v., v. 484. In commenting upon this passage *Juggernath* says: 'Acts injurious to her husband, the administering of poison, or the like, who has no sense of shame, who goes to other towns on false pretences, or the like, who destroys his effects, who incurs expenses for immoral purposes.' Nor is this doctrine wanting in the support of the commentators. We have already seen what *Juggernath* says upon the subject; and the following passages will shew that several other commentators also are of the same opinion. 'Therefore the property given to a chaste woman by her father-in-law and others shall not be resumed by the relatives, as is declared by *Vrihaspati*. If she prove otherwise, the property given to her may be resumed. Thus *Catyayana* says: 'It is the wife devoted to her husband who is entitled to enjoy the property given to her.

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If she is not so devoted, she is entitled to maintenance. But she who is mischievous or shameless, or who destroys his effects, or who is unchaste, should be unworthy of the property': Viramitrodaya, p. 203. *Rughoo Nunduna* also relies, in p. 53 of his Dayatatwa, upon the text of *Narada* quoted above; and, what is still more important for the purposes of our decision, is, that he relies upon it with express reference to the estate inherited by a widow from her deceased husband. The author of the Vivada Chintamani, after citing the text of *Catyayana*, 'But a wife who does malicious acts,' &c., says, 'who does malicious acts, &c. This shews that the kindred should demand the peculiar property from such a woman:' *Prosunno Coomar Tagore*, Vivada Chintamani, p. 266. The word 'even' (অপি) is omitted in *Baboo Prosunno Coomar's* translation, but it goes to shew most distinctly that the rule is *à fortiori* applicable to every other kind of property belonging to a woman.

"It may be conceded that the Courts of Justice in this country are not bound to enforce this rule, inasmuch as it has no necessary connection with the law of inheritance, but it throws considerable light on the question we have to determine in this case. If we once admit that want of chastity is, in the eye of the Hindu law, a ground of forfeiture in the case of a woman's stridhan, over which she has an almost absolute dominion, the inference is almost irresistible that the same rule must apply, at least with equal force, to the case of property given to a widow for a special purpose, the fulfilment of which is altogether inconsistent with the loss of her chastity. Indeed, the Hindu law goes on to declare that an unchaste woman is not entitled even to maintenance. We do not wish to multiply authorities on this point, and we will therefore conclude these remarks by quoting the following passage from the Dayabhaga, in which it is expressly laid down that an unchaste woman should be expelled from the family house. "Their childless wives conducting themselves aright must be supported, but such as are unchaste should be expelled (নির্ব্বাসিত):' Dayabhaga, chap. v., v. 19. Of course the childless wives referred to in this passage are the wives of persons who are themselves disqualified to inherit, but there seems to be no reason whatever why the same rule should not apply with equal force

to the wives of those members of the family who are fortunate enough to inherit the family estate.

"It has been said that some of the texts quoted above refer to many other virtues besides chastity, and that the argument in favour of forfeiture would be equally strong in the case of the widow's derelictions in respect of those virtues as in the case of her failure to preserve her chastity. But the answer to this objection is very plain. A chaste widow who has failed to perform her duties to-day may perform them on some future date. But a widow who has once sullied the bed of her lord not only 'causes her husband's soul to fall into a region of torment,' but becomes from that time absolutely incompetent to do anything for his spiritual welfare. All her fastings and acts of piety become fruitless and vain, and as she no longer remains half the body of her husband, her estate must necessarily come to an end.

"It has been further said that adultery is an expiable offence under the Hindu Shastras. Whether it is so or not appears to be a doubtful question. *Kullukabhutta*, the celebrated commentator upon *Menu*, makes the following observations upon a text of the latter, which has been already quoted in this judgment:—'None of the ceremonies at the birth of children and so forth are performed for females with holy texts. This limitation of law is fully settled, hence, through the want of solemn rites, accompanied with holy texts, they are not divested of sin; through the want of evidence of law and scriptures they are not acquainted with the system of duties, and, having no expiatory texts—that is, being incapable of expiating a sin actually committed, since they are debarred from the silent repetition of expiatory texts—women are as foul as falsehood itself, &c.'—*Colebrooke's* Digest, bk. iv. v. 25. Some of the modern writers, however, appear to be of a different opinion, though even according to them expiation is not permitted after the birth of illegitimate children, which is in fact what has happened in the present case. But we do not wish to meet this objection upon this narrow ground. Assuming that expiation is allowable in a case like the present, we are unable to see how that circumstance can affect our decision one way or the other. Expiation might save the widow from the future punishments prescribed for the act itself, but there is no authority in the Hindu law, so far as

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we are aware of, to support the contention that it can control the operation of the special texts under which she inherits, or that it can render her chaste after she has once become unchaste. It is the chaste widow, and the chaste widow alone, who is allowed to inherit the estate of her deceased husband, and she is expressly told to use that estate solely and exclusively for his spiritual welfare, subject to the condition of 'preserving his bed unsullied.' Once unchaste she must remain unchaste for ever, and therefore for ever incompetent to satisfy the condition upon which her title depends. Indeed, if expiation can bar the forfeiture, it can bar the disinherison also; but there is no authority whatever to support either of these propositions. The Hindu law, it should be remembered, recognised the institution of suttee. The barbarous practice was current in the country down to a very recent date, when it was abolished by the British Government. But barbarous as it was, it serves as a valuable guide to the true spirit of that law on the particular subject now before us. If the widow wishes to survive her husband, and to represent him and his estate as half his body, she must remain a suttee or chaste woman throughout her life; and it is upon this express condition that she is allowed to take and to enjoy that estate in default of male issue. Indeed, the Hindu law is, as we have already shewn, extremely averse to give property to women, and one of the special reasons assigned for making an exception in the widow's favour is that by obtaining property she would be able to avoid temptations of want, and so preserve her chastity, and thereby save her husband's soul from the torments of a 'region of horror.' The case of a widow appointed to raise up issue for her husband, which has already been cited from the Mitakshara, appears to have a very important bearing upon this point. Such an appointment was not, at the time when that work was written, without some support from the Hindu Shastras, though it was condemned by popular practice, as the author himself tells us; and it is, therefore, clear that no amount of prayaschitta, or penance, can restore a widow guilty of unchastity to the same position as one who is appointed to raise up issue by the express command of her husband. If expiation is allowable in the one case, it would be equally allowable in the other; and if a widow who has raised up issue cannot recover the

inheritance by expiation, the unchaste widow cannot merely by reason of such expiation claim to stand in a higher position.

"But there is another difficulty of a still more formidable character, which must be overcome before this objection can prevail against our view. The widow having, by reason of her unchastity, once become incompetent to use the estate of her deceased husband, her right to use that estate ceases; and as, according to a well-known principle of Hindu law, property can never remain in abeyance, the estate must immediately vest in the nearest heir of the husband, and, having once gone there, no subsequent expiation on her part can bring it back to her. It has been said that, according to the Hindu law, an estate once vested cannot afterwards be divested. But not only is this rule not without exceptions, but its application must necessarily depend upon the nature of the estate in question. In the case of male heirs, who become the true owners of the property in the full sense of the term, such application cannot give rise to any difficulty, although even in such cases the Hindu law recognises certain exceptions to which it is not necessary here to refer. But the case of a widow stands upon a quite different footing. Her estate is one, as we have already shewn, essentially in the nature of a trust estate, for she can use it only for a particular purpose, and for no other; and if she has, by her own conduct, rendered herself totally incapable of using it for that purpose, the divesting must follow as a necessary consequence.

"Much stress has been laid upon the fact that unchastity is not included in the chapter on exclusion from inheritance either in the Mitakshara or in the Dayabhaga. The original works, however, are not divided into chapters at all. But be this as it may, the answer to this objection is obvious. The grounds referred to are general grounds, applicable to both classes of heirs, male and female. But the widow's case is of a special nature. As a woman she would have been altogether excluded from the inheritance but for the special texts in her favour; and as she takes the estate under those texts, she must abide by the special conditions therein laid down, in addition to the general conditions to which all other heirs are subject. The preservation of her chastity is, strictly speaking, more in the nature of a permanent condition attaching

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to the right itself than a ground of exclusion from inheritance. All married wives are not allowed to inherit. It is only those who are entitled to the rank of patnis, and of these those only who are chaste, are allowed to inherit at all; and they are merely allowed to "use" the estate in a specified mode as long as they continue chaste. Those married wives who are not entitled to the rank of patnis are allowed maintenance only, but even that is resumable at the instance of the lawful heir if they proye unchaste, as may be seen from v. 48, s. 1, ch. xi. of the Dayabhaga.

"It may be further remarked that this objection would apply with equal force to the case of a widow who is found unchaste at the time when the succession opens out, but that such a widow has no right to inherit under the Hindu law appears to be almost universally admitted.

"We will now proceed to discuss the two remaining classes of authorities,—namely, the decisions of Courts of Law, and the opinions of European writers on Hindu law.

"So far as the decisions are concerned, the earlier ones, supported as they are by the dicta of the Pundits then consulted, are all in support of our view. The first case in point of date is reported in 2 *Macnaghten's* Hindu Law, p. 20. That case arose in the district of *Hooghly*, and it was distinctly held therein that an unchaste widow forfeits all right to her husband's estate. The next case reported in that volume is also of considerable importance. It arose in the 24-Pergunnas, and it was expressly held therein that an unchaste widow is liable to be expelled from the family house of her husband. The next case is reported in the same volume, p. 112. In that case it was held that an unchaste widow is not entitled to maintenance from her husband's brother even though she may have resigned her right in the property of her husband in his favour in consideration of such maintenance. The case of *Maharanee Bussunt Komaree* v. *Maharanee Kummul Comaree* (1) is also in support of this view as far as it goes, and it was evidently treated as a case of elopement. The case of *Rajkoonwaree Dassee* v. *Golabee Dasee* (2) is also in point so far as the question of disinherison is concerned. It is true that in that case there was an allegation of desertion by the husband in his lifetime, but

(1) 7 Sel. Rep. 144. (2) S. D. A. 1858, 1891.

this allegation was considered merely as a piece of evidence on the only issue of fact which was raised in it—namely, whether the woman was chaste or otherwise, as may be seen from the judgment itself. In the case of *Doe* d. *Radamoney Raur* v. *Neelmoney Doss* (1) it was unanimously held by *Chambers*, C.J., *Hyde*, *Jones*, and *Dunkin*, JJ., that an unchaste widow forfeits all her rights in the estate of her deceased husband. The case of *Doe* d. *Saummoney Dossee* v. *Nemychurn Doss* (2) is certainly the other way. But no authorities are cited in the judgment, nor does it appear that the earlier cases were brought to the notice of the learned Judge by whom it was passed, as may be seen from the concluding words of his judgment, in which he says:—'Further, in this case the widow had been for some time in rightful possession, and the Court would be disinclined to disturb her in the absence of any decision of a Court of law, shewing that such a person for such reason as above stated, might be expelled from possession.' The last case is that of *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (3); but, for the reasons above stated, we feel ourselves bound to say that it is contrary to the Hindu law.

"As for the European writers, Mr. *Colebrooke* is undoubtedly the highest among them in point of authority, and his opinion, as reported in 2 *Strange*, p. 272, appears to have been that, although unchastity is a cause of disinherison, a widow who has once succeeded to the estate of her deceased husband cannot be afterwards divested of it except for loss of caste, unexpiated by penance, and unredeemed by atonement. This opinion, however, was given in a case which originated in *Trichinopoly*; nor does it appear that it was given with any reference to the authorities current in the *Bengal* school. It is also to be observed that the question propounded in that case contains no specification of the particular bad conduct of which the widow was guilty. But be this as it may, there is no authority cited to support the proposition that loss of caste is the only ground of forfeiture recognised by the Hindu law, or that penance and atonement can prevent forfeiture any more than they can prevent disinherison. The great name of Mr. *Colebrooke* is, no doubt, an authority entitled to the highest

(1) Montriou's H. L. Ca. 314. (2) 2 Taylor & Bell, 300.
(3) 5 Beng. L. R. 466.

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respect; but, for the reasons above stated, we are constrained to say that in this particular instance it cannot be taken as conclusive. We wish further to remark that Mr. *Ellis* of *Madras*, who also was consulted in that very case, gave an opinion directly supporting our view, as may be seen from one of the notes subjoined to it. As for the opinion of Sir *Thomas Strange*, it seems to be based entirely upon that of Mr. *Colebrooke*, and we do not therefore wish to dwell upon it any further. The opinion of Sir *William Macnaughten* seems to be in support of our view, as may be seen not only from the remarks made by him in page 19 of the first volume of his work on Hindu law, in which he distinctly says that a widow in possession of her husband's estate is nothing more than a trustee for certain purposes, but also from the cases which are cited by him as leading authorities in the second volume of that work, and which have been already commented upon by us. The only other European writers we wish to refer to are *Elberling* and *West* and *Bühler*. Both these authorities, however, are in support of our opinion, as may be seen from the remarks contained in *Elberling's* Treatise on Inheritance, p. 73, and in *West* and *Bühler's* work on Hindu Law, p. 99.

"Supposing, however, that the preceding conclusion is correct as far as it goes, the next question we have to determine is whether this case falls under the purview of Act XXI. of 1850.

"We are of opinion that this question ought to be answered in the negative. This Act was passed for extending the principle of s. 9, Regulation VII., of 1832, of the *Bengal* Code, throughout the territories subject to the *East India Company*, and its preamble is as follows:—'Whereas it is enacted by s. 9, Regulation VII. of 1832 of the *Bengal* Code, that, "whenever in any civil suit the parties to such suit may be of different religious persuasions, when one party shall be of the Hindu, and the other of the Mahomedan, persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled." And whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the government of the *East*

India Company.' These words seem to prove conclusively that the one object which the Legislature had in view in passing the Act was to extend the principle of religious toleration; and the inference is, therefore, almost irresistible that it could not have been intended to govern a case like the present. The violation of conjugal duty is an offence against universal morality, and it is upon this ground that contracts based upon adulterous considerations are declared by Court of Justice to be absolutely null and void. To hold that an unchaste woman is entitled to claim the same privilege as a person who has conscientiously changed his religion would be manifestly opposed to public policy; and we are therefore of opinion that the construction of the Act ought to be limited to the furtherance of the great principle enunciated in its preamble, and not extended to a case of positive immorality like the one before us. It has been often remarked that the preamble of an Act is the key to its interpretation, and we do not see any reason whatever why we should extend the operation of the Act in question beyond the limits proposed by its framers, and that at the risk, as Mr. *Sconce* puts it in his judgment in the case of *Rajkoonwaree Dassee* v. *Golabee Dassee* (1) " of relaxing the bonds which tend to secure and elevate the relations of married life.'

" But there are two other reasons, each of which seems to lead to the same conclusion. In the first place it is clear that Act XXI. of 1850 cannot possibly give to any party any right higher than that to which he or she is entitled under the law from which that right is derived. Such a construction would be directly contrary to the principle laid down in the preamble. The Hindu widow takes the estate of her deceased husband under the Hindu law, and that very law prescribes in so many terms that she should remain chaste, and use it for a particular purpose, and for no other. If, therefore, she has done an act the consequence of which is to render her absolutely incompetent to use that estate, a forfeiture would be inevitable, notwithstanding the provisions of Act XXI. of 1850. That Act cannot possibly give her any estate higher than that of a Hindu widow; and if she is no longer in a position to use that estate in the only mode sanctioned by the Hindu law, her right to it must die a natural death. Suppose,

(1) S. D. A. 1858, 1891.

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for instance, that a Hindu is appointed the shebait of a Hindu temple, and that the endowed property is made over to him subject to the condition of using it for the benefit of the idol, and for no other purpose. If such a person becomes a Mahomedan and thereby renders himself incompetent to fulfil the conditions of his appointment, can it be contended that Act XXI. of 1850 would entitle him to retain the trust property notwithstanding the conversion? Suppose, again, that a Hindu widow, after having succeeded to the estate of her deceased husband, becomes a convert to Mahomedanism, and is about to spend a portion of the government securities left by him in order to defray the expenses of a pilgrimage to *Mecca*. If the reversioner brings a suit for restraining her from using the securities for such a purpose, can the Court refuse to grant him the relief sought for? We apprehend not, and if this is conceded, the same principle would equally apply to every other use made by such a widow of her husband's property, for she has by reason of her very conversion, incapacitated herself from using that property in the only mode in which she could have used it. The Hindu law, it should be remembered, makes no distinction between the corpus and the income of the estate. On the contrary, we have shewn already that they are both governed by the same texts.

"It should not be objected that the above view of a Hindu widow's estate is too much mixed up with the Hindu religion. That is, to a certain extent, unavoidable in dealing with all questions arising out of the Hindu law. The legislators of the Hindus were also their priests, and it is in consequence of this circumstance that the Hindu law, at least that portion of it which relates to inheritance, is placed entirely on the basis of the Hindu religion. The institution of marriage is still regarded by the Hindus as a sacrament. It is the foundation of the family—one of their dearest and most cherished institutions—and as such the foundation of their society, for society after all is an association of families. To preserve the purity of conjugal relation was one of the chief objects which the Hindu legislators had in view; nor need we be surprised at the stringency of the provisions made by them to secure that object, when we take into consideration the condition of Hindu women in general. Their ignorance and their want of

experience render them liable to be easily deceived, and it is for this reason that the Hindu law has put so many restraints upon them. To remove those restraints until better ones are substituted in their place, would be to introduce a dangerous innovation: nor do we see any reason in justice or equity why the estate of the Hindu widow should not be regulated by the law from which it is derived. We are bound to administer the Hindu law as we find it, and we have, therefore, no power to refuse to give effect to that law, merely because it happens to be mixed up with the Hindu religion.

"Lastly, there seems to be nothing even in the body of the Act which can render it applicable to the case of a Hindu widow who is guilty of unchaste conduct. It consists of one section only, and that section is as follows:—'So much of any law or usage now in force . . . . as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste shall cease to be enforced as law.'

"Now the case of an unchaste widow does not fall within any of the three contingencies contemplated by this section. That it is not a case of renunciation of religion or of exclusion from the communion of any religion, is almost self-evident; nor can it be said to be a case of loss of caste. Loss of caste might be in some cases the consequence of loss of chastity, but it is not a necessary consequence. The guilty parties might both belong to the same caste, and in such case there need not be any loss of caste at all; nor is there anything in the Hindu law which says that an unchaste widow forfeits her right, because she has lost her caste. She forfeits it because she is not a shadhi, or chaste woman, and there is nothing in Act XXI. of 1850 to provide for her case. The Hindu who is born blind, or destitute of any other sense or member of body, cannot inherit, notwithstanding the provisions of this Act, and his case affords an additional ground for holding that its operation was purposely limited to cases involving a change of religious persuasion as indicated by the preamble.

"The Act for the remarriage of Hindu widows (No. XV. of 1856) also tends to throw some light on this point. That was

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passed nearly six years after the promulgation of Act XXI. of 1850, and it was passed for the express purpose of removing all legal obstacles to the marriage of Hindu widows. Now it is clear that a Hindu widow who marries a second husband loses, under that Act, all the rights and interests which she has in her former husband's estate; and it is scarcely reasonable to suppose that such a provision would have been introduced in an Act passed with such an object, if Act XXI. of 1850 had the extended operation which is sought to be given to it. We admit that we have, strictly speaking no right to use this circumstance as an argument by itself, for the Legislature might in 1856 have misconstrued what it had done in 1850. But we refer to it for the purpose of shewing how the law was understood to be in 1856, not only by the Legislature itself, but even by that portion of the Hindu community at whose special request Act XV. of that year was passed."

The case having been argued before the Full Bench, *Couch*, C.J., and *Jackson*, *Phear*, *Macpherson*, *Markby*, *Ainslie*, and *Pontifex*, JJ., were of opinion on the first question referred to them that under the Hindu law of the *Bengal* school a sonless widow who had once inherited the estate of her deceased husband was not liable to forfeit it by reason of unchastity, and that it was not necessary to decide the second question referred to them.

On the other hand, three Judges, *Kemp*, *Glover*, and *Dwarkanath Mitter*, JJ., were of the opposite opinion as to the first question and did not decide the second question, which *Glover*, J., thought did not arise, as "there was no contention that the widow had been excluded from caste."

In accordance with the opinion of the majority of the Full Bench the High Court reversed the judgment of the Deputy Commissioner, and restored the decree of the first Court.

The judgment in the case before the Appellate Bench will be found reported in 13 Beng. L. R. pp. 2 to 29; and those before the Full Bench at pp. 39 to 90 of the same volume.

Cowie, Q.C., and *Doyne*, for the Appellant, contended the judgments of the majority of the High Court were erroneous, and that the decree founded thereon should be reversed. The correct con-

struction of the Hindu Law of the *Bengal* school and of the authorities relating thereto, it was contended was laid down in the judgment of Mr. Justice *Dwarkanath Mitter* as printed above. According thereto it should have been held that a sonless Hindu widow who by reason of her chastity had obtained the estate of her husband, was entitled to continue to enjoy that estate only so long as the qualification of chastity itself and the spiritual benefit accruing therefrom to her deceased husband should continue. Reference was made to *Strange's* Hindu Law, vol. i. p. 136 [2nd ed.], and to passages of the Mitakshara and *Colebrooke's* Digest therein cited; Mitakshara, c. ii. s. 1, vv. 30, 37; vol. ii. pp. 270, 272 (a case decided in 1809); *Montriou's* edition of *Morton's* Reports, p. 314; *Macnaghten's* Principles of Hindu Law, vol. i. p. 20; vol. ii. p. 19; *Maharanee Bossunt Komaree* v. *Maharanee Kummul Komaree* (1); *Doe* d. *Saummoney Dossee* v. *Nemychurn Doss* (2); *Parvati* v. *Bhiku* (3); *Syamalall Datt* v. *Soudamini Dasi* (4); *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (5); *Gobindmani Dasi* v. *Shamlall Bysak* (6); *Soorjeemony Dossee* v. *Denobundhoo Mullick* (7); *Hurrydoss Dutt* v. *Sreemutty Uppoornah Dossee* (8); *Nehalo* v. *Kishen Lall* (9), Feb. 24, 1879, which followed the case now under appeal.

The Respondent did not appear.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decision of a Full Bench of the High Court of Judicature at *Calcutta*. It was admitted by virtue of a special Order of Her Majesty in Council, whereby the Appellant had leave to appeal in the form of a special case upon the following questions, viz.,—

1st. Whether, under the Hindu law, as administered in the *Bengal* school, a widow who has once inherited the

(1) 7 Select Rep. 144; new Ed. p. 168.
(2) 2 Tayl. & Bell, p. 300.
(3) 4 Bombay H. C. R. (A. J.) 25.
(4) 5 Beng. L. R. 362.
(5) 5 Beng. L. R. 466, 488.
(6) Beng. L. R. (Supp. Vol.) 48.
(7) 9 Moore's Ind. Ap. Ca. 133.
(8) 6 Moore's Ind. Ap. Ca. 433.
(9) 2 Ind. Law Rep. (Allah. Series) 150.

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estate of a deceased husband is liable to forfeit that estate by reason of unchastity; and,

2nd. Whether the forfeiture, if any, is barred by Act XXI. of 1850.

The appeal was admitted, on account of the importance of the questions submitted for determination and the great interest which the Hindu community take in it.

The case came in the first instance upon special appeal before a Division Bench, consisting of Mr. Justice *Bayley* and Mr. Justice *Dwarkanath Mitter*, who were of opinion that the Defendant had, by reason of unchastity, forfeited her right in her husband's property, but in consequence of a contrary ruling of the High Court referred the two questions above mentioned to a Full Bench, with their remarks thereon.

The Full Bench consisted of the Chief Justice and nine other Judges, and the majority held that the widow, having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Three of the Judges, however, viz., Mr. Justice *Kemp*, Mr. Justice *Glover*, and Mr. Justice *Dwarkanath Mitter*, dissented from the opinions expressed by the majority of the Court. The case is fully reported in the 13 *Bengal* Law Reports, p. 1.

The subject has been very elaborately discussed by the Chief Justice and the other Judges of the Full Bench, and it has also been fully argued before their Lordships on behalf of the Appellant. The Respondent did not appear.

The opinion of Mr. Justice *Dwarkanath Mitter*, who was himself a learned and accomplished Hindu lawyer, and those of the other two Judges who were in the minority, are entitled to very great weight, but, having considered and weighed all their arguments, their Lordships are unable to concur in the opinions which they expressed.

The earliest case in which the subject was fully discussed in the High Court is the case of *Matangini Debi* v. *Srimati Jaykali Debi* (1), which was the cause of the reference.

That case was originally tried before Mr. Justice *Markby*, who

(1) 5 Beng. L. R. 463.

delivered a judgment in which he shewed much research and great knowledge of the subject. The case was appealed to the High Court, and heard before the then Chief Justice and Mr. Justice *Macpherson*, who affirmed the judgment of Mr. Justice *Markby*.

Their Lordships will, in the first instance, advert to the judgments of the dissentient Judges, and in particular to the opinion expressed by Mr. Justice *Dwarkanath Mitter*, on referring the case, and to his judgment after the argument in the Full Bench. Reasoning from the general notions of the Hindu commentators, touching the frailty and incapacity of women, and the necessity for their dependence upon and control by some male protector; and, from the origin and nature of a widow's interest in the property which she takes in succession to her husband, he arrived at the conclusion that she is, as he expresses it, "a trustee for the benefit of her husband's soul"; that inasmuch as, by reason of unchastity subsequent to her husband's death, she becomes incapable of performing effectually the religious services that are essential to his spiritual welfare, she ceases to be capable of performing her trust, and must therefore be taken to have broken the condition on which she holds the property, and to have incurred the forfeiture of her estate. It may be remarked that the other two dissentient Judges differed from Mr. Justice *Mitter's* view of the nature of a Hindu widow's estate, and, therefore, from a good deal of the reasoning upon which his conclusion is founded. But, however that may be, their Lordships entirely concur with the Chief Justice and the majority of the Judges in rejecting the somewhat fanciful analogy of trusteeship.

Mr. Justice *Glover's* judgment is founded upon the express texts, and upon the ground that by reason of unchastity a widow becomes incapable of performing those religious ceremonies which are for the benefit of her husband's soul. He draws a distinction between a widow and a son, and says (13 Beng. L. R. p. 55):—

"The theory of the Hindu law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer greatest benefits, therefore

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they are first in the line of heirship. The *widow comes next, as being able to confer considerable, though less, benefits,* and *it is only because she is able to do this that she is allowed to take her husband's share.*

"It would seem, therefore, to be a condition precedent to her taking that estate, that she should be in a position to perform the ceremonies, and offer the continual funeral oblations, which are to benefit her deceased husband in the other world; and in this respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called *put;* and, whether in after-life he offer the funeral oblations or no, *he succeeds to his father's inheritance from the fact of being able to offer them.* With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases."

These reasons do not appear to be sufficient to support the learned Judge's conclusion that a widow forfeits her estate when she ceases to be able to perform the necessary religious ceremonies. It is admitted that she may by law hold the estate without performing them, and that she may give, sell, or transfer the estate to another for her own life. Nor does there appear to be any sufficient reason for the distinction attempted to be drawn between a son or other heirs and a widow with reference to the forfeiture of the estate when the person who has succeeded to it has become incompetent to perform the duties which he or she ought to perform. The proprietary right of a son by inheritance from his father is expressly ordained, because the wealth devolving upon sons benefits the deceased (Dayabhaga, cap. 11, s. 1, v. 38), and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse), see also verse 32. But a son, even if by the mere fact of his birth he delivers his father from the hell called *put,* is, according to the Dayabhaga, excluded for certain causes from inheritance in the same manner as other heirs (Dayabhaga, cap. 5, par. 4, 5, and 6); but, if he once succeeds, the estate is not divested for anything less than degradation, though causes which would have

excluded him if they had existed before succession arise after the estate has descended. This is admitted by Mr. Justice *Mitter* (see *ante*, p. 121).

Their Lordships will proceed to consider the principal texts upon which the learned Judges who were in the minority founded their judgments.

Mr. Justice *Mitter*, in his judgment, delivered upon the Full Bench (13 Beng. L. R. p. 40), says:—

"Of all the authorities above referred to, the Dayabhaga of *Jimuta Vahana*, the acknowledged founder of the *Bengal* school, is undoubtedly the highest; and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only,—namely, the text of *Vrihat Menu*, cited in v. 7, s. 1, ch. xi. of Mr. *Colebrooke's* translation of the Dayabhaga; and that of *Catyayana*, cited in v. 56 of the same section and chapter. These two verses are as follows:—

'(1.) The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.'

'(2.) Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.'"

With regard to the former of the texts above cited, although the present participle is used, it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently. It cannot mean up to the time of her presenting the funeral oblation; for, notwithstanding the order of the words, the meaning of the text is, that having obtained the husband's share, the patni or widow should perform those ceremonies conducive to the spiritual benefit of her husband and herself, which can be accomplished by wealth, and which a female is competent to perform. See the Vira Mitrodaya, cap. 3, pt. 1, s. 2, and the Smriti Chandrika, cap. 11, s. 1, vs. 13, 16, and 20. In this view the text would run thus,—"The widow of a childless

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man having kept unsullied her husband's bed, and persevered in religious observances, shall obtain his entire share, and present his funeral oblation."

Mr. Justice *Glover* points to the words "persevering in religious observances," to prove that the whole text applies to a period subsequent to the husband's death, and as referring to a continually abiding condition, because he assumes that a wife cannot perform religious observances during her husband's life, and that, therefore, those words must have relation to a period after her husband's death. But the assumption does not appear to be correct, for in the Smriti Chandrika, cap. 11, s. 1, verse 17, the meaning of the words, "persevering in religious observances" are thus explained, "practising religious ceremonies even during the lifetime of the husband, with the husband's permission," &c., whence the inference is drawn, in verse 18, that a patni to inherit her husband's estate must be a pious woman. And again in verse 12, a virtuous woman is "one that lives with her husband, associating with him in the performance of rites ordained by *Çruti* and *Smruti*, and observing fastings and other religious ceremonies."

The second of the texts relied upon is that of *Catyayana*.

It is important to see for what purpose the text was cited, and with that view to refer to the verses immediately preceding those in which the text is cited, for there is nothing more likely to mislead than to read a single paragraph from the Dayabhaga or Mitakshara alone without studying the whole chapter, and in some cases, even, without studying several chapters of the same treatise.

In cap. 11, s. 1, the author of the Dayabhaga, verse 54, sums up his argument in support of the widow's right to succeed to the entire property of her husband, for which purpose he had cited the text of *Vrihat Menu*. He says:—

"By the term 'his share' is understood the entire share appertaining to her husband, not a part only," (the translator adds the words "sufficient for her support").

And then in verse 55 he concludes:—

"Therefore the interpretation of the law is right as set forth by

us," viz., that "the widow's right must be affirmed to extend to the whole estate" of her husband (v. 6).

He then proceeds, in verse 56, to deal with the mode of enjoyment, and to shew that notwithstanding a widow takes the entire estate, she is not entitled to make a gift, sale, or mortgage of it, to the exclusion of her husband's heirs. He says:—

"But the wife must only enjoy her husband's estate after his demise; she is not entitled to make a gift, mortgage, or sale of it."

And then, in support of that proposition, he refers to the second text cited, and proceeds:—

"Thus *Catyayana* says:—'Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. *After her death* let the heirs take it."

Mr. Justice *Mitter* in his judgment remarks, at p. 41 of 13 Beng. L. R., that the author of the Dayabhaga cited that text, not for the purpose for which he cited that of *Vrihat Menu*, viz., that of establishing a widow's right to succeed to the entire estate of her deceased husband, but for that of defining the nature and extent of the interest which devolves upon her by virtue of that right.

In his remarks made on referring the case, however, he reasons upon it as an isolated text, and says (see *ante*, p. 129):—

"This passage shews clearly, not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'preserving unsullied the bed of her lord.' *The participial form* of the word 'preserving,' *i.e.*, continually preserving, which is also the form used in the original (*palayanti*), proves conclusively that the injunction is one in the nature of a permanently abiding condition, which the widow is bound at all times, and under all circumstances, to satisfy; and the right of enjoyment conferred upon her being expressly declared *to be subject to such a condition*, every violation of it must necessarily involve a forfeiture of that right."

Mr. Justice *Glover* also, at page 57, expresses a similar opinion,

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and he refers to the present participle "preserving" as denoting continuance, and as referring to the time after the widow has taken the property originally, and, he adds besides, if the words "keeping unsullied" refer only to past time, what is to be made of the other part, which he assumes to import a condition, viz., "living with her venerable protector." "She cannot," he says, "live with him until she is a widow, and while she lives with him she is to keep unsullied her husband's bed." It is by treating the words "living with her venerable protector" as constituting a condition that he endeavours to add force to his argument that the words "keeping unsullied the bed of her lord" also express a condition. But that argument fails, inasmuch as it has been expressly held by the Privy Council, in the case of *Cossinaut Bysack* v. *Hurrosoondry* (1), that the words "abiding with her venerable protector" do not create a condition of forfeiture in case of her refusing to abide with him. Referring to that decision, Mr. Justice *Mitter* says that it lends in an indirect way considerable support to his view, inasmuch as that particular case was decided expressly upon the ground that the widow had not changed her residence for unchaste purposes. Their Lordships, however, are of opinion that the words "abiding with her venerable protector" do not, under any circumstances, create a condition or a limitation of a widow's right to enjoy the property of her husband to the period during which she abides with her protector. They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words "preserving unsullied the bed of her lord," nor the words "and abiding with her venerable protector," import conditions involving a forfeiture of the widow's vested estate; but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of *Catyayana's* text taken by itself, as what are the conclusions which the author of the Dayabhaga has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs *Lower Bengal*, whilst on the other hand nothing is more certain than that, in dealing with the same ancient texts,

(1) Vyavastha Darpana, 97, and 2 Morley's Digest, 198.

the Hindu commentators have often drawn opposite conclusions. Now how has *Jimuta Váhana* dealt with this particular text? It has been seen for what purpose he cited it; but how does he comment on it in the rest of the section in which it occurs? He comments on the words "venerable protector" (v. 57); he defines who are intended to take after the demise of the widow under the term "the heirs" (vs. 58 and 59); glances at her duty to lead an abstinent, if not an ascetic, life, and to avoid "waste" (vs. 60 and 61), and deals with her power of alienation, and the limitations upon it (vs. 62, 63, and 64). But he nowhere says one word from which it can be inferred that, in his opinion, the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a commentator so acute and careful as *Jimuta Váhana*, if he had drawn from the text of *Catyayana* the inference that a widow was to forfeit the estate if she should become unchaste after her husband's death, would not have stated that inference clearly by saying, in v. 57, "let her enjoy her husband's estate during her life, or so long as she continues chaste," instead of using only the words "during her life" and stating that "when she dies" the daughters and others are to succeed.

The right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession. However, the texts cited in regard to maintenance shew that when it was intended to point out that a right was liable to resumption or forfeiture clear and express words to that effect were used. *Jimuta Váhana* in c. 11, s. 1, v. 48, of the Dayabhaga refers to a text of *Nárada*, in which he says, "Let them allow a maintenance to his women for life, provided they keep unsullied the bed of their lord. But if they behave otherwise the brother may resume that allowance." How different are those words from those used in the text of *Catyayana*.

Mr. Justice *Mitter*, in order to get rid of the argument that a daughter becoming a sonless widow or unchaste after having succeeded to the estate of her father does not forfeit the estate, argues that the texts to which he refers are applicable to a

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daughter as well as to a widow, and he refers to v. 31, s. 2, c. 11, of the Dayabhaga to shew that the text of *Catyayana* is applicable to all women. (See 13 Beng. L. R. p. 45 and 46, 48 and 49.)

It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either the above-mentioned texts of *Vrihat Menu* or that of *Catyayana*. Those texts have reference to the bed of the deceased owner of the estate. The words, "his funeral oblation," and "his share," and "the property," have reference to the oblation, the share, and the property of the lord or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of a daughter or mother, as the case may be, of the deceased owner, who, in default of a widow, may be next in succession to inherit his estate.

Verse 31, s. 2, c. 11, only extends to other women the rule applicable to a wife, that a gift, sale, or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owner are to take, and not that part of the rule which is included in the words "keeping unsullied the bed of her lord." This is made clear by sect. 30, in which it is said:—

"Since it has been shewn by text cited (sect. 1, v. 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would regularly inherit his property if there were no widow in whom the succession vested, namely the daughters and the rest, succeed to the wealth; therefore, the same rule (*concerning the succession of the former possessor's* next heirs) is inferred *à fortiori* in the case of the daughter and grandson (meaning a daughter's son), whose pretensions are inferior to the wife's."

Then comes sect. 31, which is in the words following:—

"The word 'wife' in the text above quoted (sect. 1, v. 56) is employed with a general import, and it implies that "the rule" (meaning the rule referred to in cap. 11, s. 2, and para. 30) "must be understood as applicable generally to the case of a woman's succession by inheritance."

Their Lordships have dwelt at some length upon the two texts that have been considered, since it is upon them that the arguments of the dissentient Judges are mainly founded. For the reasons above stated, they are of opinion that these texts, neither expressly nor by necessary implication, affirm the doctrine that the estate of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

The judgments of the High Court have so exhaustively reviewed the later authorities upon this question that their Lordships do not think it necessary to go through the same task. It is sufficient to say that in their opinion those authorities, though in some degree conflicting, greatly preponderate in favour of the conclusion of the majority of the Judges of the High Court.

In their Lordships' view it has not been established that the estate of a widow forms an exception to what appears to be the general rule of Hindu law, that an estate once vested by succession or inheritance is not divested by any act which, before succession or incapacity, would have formed a ground for exclusion of inheritance.

The general rule is stated in the Vira-Mitrodaya, a book of authority in *Southern India* (see 12 Moore's Ind. Ap. Ca., 466, and Mr. *Colebrooke's* Preface to the Dayabhaga), and which may also, like the Mitakshara, be referred to in *Bengal* in cases where the Dayabhaga is silent. It is there said, in para. 3 of the chapter on Exclusion from Inheritance (ch. 8), "among them, however, an outcast (*patita*) and addicted to vice (*upa pátáki*) are excluded if they do not perform penance," and then in para. 4 the exclusion again of these takes place if their disqualification occur previously to partition (or succession), but not if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares. In para. 5 it is said that the masculine gender in the word "outcast," &c., is not intended to be expressive of restriction, and that the law of exclusion based upon defects excludes the wife or the daughters, female heirs, as well.

Mr. Justice *Jackson* has ably pointed out the great mischief, uncertainty, and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly in the present constitution of Hindu society, and the

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relaxation of so many of the precepts relating to Hindu widows. The following consequences may also be pointed out.

According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship (as to which see the *Shivagunga Case* (1)) does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband (2). The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death (3).

If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews, sons of deceased brothers. The wife succeeds to the estate and the surviving brother is her protector. (*See* Dayabhaga, cap. 11, s. 1, v. 57.) If he survive the widow, he, according to the *Bengal* school, will take the whole estate, as sole heir to his deceased brother, and the nephews will take no interest therein, for brothers' sons are totally excluded by the existence of a brother (Dayabhaga, cap. 11, s. 1, v. 5; *id.* cap. 11, s. 6, v. 1 and 2). The surviving brother may be advanced in years; the widow may be young. The probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation.

(1) 9 Moore's Ind. Ap. Ca. 604. (2) Ibid. 601. (3) Ibid. 400.

But, further, the widow has a right to sell or mortgage her own interest in the estate, or in case of necessity to sell or mortgage the whole interest in it. (Dayabhaga, cap. 11, s. 1, v. 62.) If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage.

Again, if the surviving brother should die in the lifetime of the widow all the nephews would succeed as heirs of their deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased, by reason of an act of unchastity committed in the lifetime of his father, and that consequently the estate had descended to his father in his lifetime, he would be entitled to the whole estate as heir to his father, to the exclusion of the other nephews. Thus the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband, who, if the widow had remained chaste, would never have succeeded to the estate; and others who would otherwise have succeeded would be deprived of the right to inherit.

In the case of *Sremathi Matangini Debi* v. *Srimati Jaykali Debi* (1), the following remark was made by the then Chief Justice. He said:—

"In the case of *Katama Natchiar* v. *The Rajah of Shivagunga* (2), it was held that a decree in a suit brought by a Hindu widow binds the heirs who claim in succession to her; but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided, if it could be shewn that she had committed an act of unchastity before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindu widow could do in reference to the estate might be avoided by raking up some

(1) 5 Beng. L. R. 490. (2) 9 Moore's Ind. Ap. Ca. 539.

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act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject; but it is an argument which may be fairly adduced when the authorities in favour of the opposite view are merely the expressions of opinion by Hindu law officers, or by European or modern text-writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight."

Upon the whole, then, their Lordships, after careful consideration of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of the Judges was the correct one, and it is important to remark that the High Court at *Bombay*, in the case of *Parvati* v. *Bhiku* (1), and the High Court in the North-West Provinces, in the case of *Nehalo* v. *Kishen Lall* (2), have given judgments to the same effect as that of the Full Bench at *Calcutta* in the present case.

The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI. of 1850; for upon degradation from caste before that Act a Hindu, whether male or female, was considered as dead by the Hindu law, so much so that libations were directed to be offered to his manes as though he were naturally dead: see *Strange's* Hindu Law, 160 and 261; *Menu*, cap. 11, s. 183. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. (Dayabhaga, chapter 1, paragraphs 31, 32, and 33.) The opinion of Mr. *Colebrooke* in the *Trichinopoly Case* is founded on the distinction between mere unchastity and degradation.

It is unnecessary to determine what would have been the effect of Act XXI. of 1850, if she had been degraded or deprived of her caste in consequence of her unchastity.

Their Lordships, for the above reasons, will humbly advise Her Majesty to affirm the judgment of the High Court.

Solicitors for Appellant: *Barrow & Rogers.*

(1) 4 Bomb. H. C. Rep. 25. (2) 2 Ind. L. R. (Allah. Series) 150.

RAM KRISHNA DAS SURROWJI . . . PLAINTIFF;

AND

SURFUNNISSA BEGUM, RICHARD HENDRY AND OTHERS . . . . . } DEFENDANTS.

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1880
Feb. 27, 28.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Alienation of Property under Attachment—Validity of Attachment—Act VIII. of 1859, *ss.* 239, 240.

Any alienation of property, subject to a valid and subsisting attachment is null and void as against the attaching creditors and those deriving title under them; unless such alienation can be shewn not to fall within sect. 240 of Act VIII. of 1859.

An objection that the formalities prescribed by sect. 239 and contemplated by sect. 240 have not been duly observed must be taken in the Court below, and cannot be raised for the first time before their Lordships; and, *quære*, whether it is not for the Plaintiff claiming adversely to a Defendant in possession to prove the non-performance of such formalities.

APPEAL from a judgment of the High Court (Nov. 24, 1876), which confirmed the judgment of the Court of Zillah 24-Pergunnahs (Sept. 13, 1875), by which the suit was dismissed with costs.

The facts of the case appear in the judgment of their Lordships.

Doyne, and *Cowell*, for the Appellant, contended that the attachment relied upon was a nullity, inasmuch as there was no compliance with the requirements of sects. 81, 82, and 83 of Act VIII. of 1859. Further, that if regular as against the judgment debtor, it did not bind the property as against the mortgagee, inasmuch as the formalities prescribed by sects. 239 and 240 of the Act had not been, upon the evidence, observed. Reference was made to *Indrochandra Baboo* v. *Dunlop* (1).

Cowie, Q.C., and *Graham*, for the Respondent, *Richard Hendry*, contended that the issue of the attachment had been admitted to

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

(1) 10 Suth. W. R. 265.

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be regular. The onus lay on the mortgagee of shewing that the formalities required had not been observed :—[SIR BARNES PEACOCK.—The onus would seem to be on him who says the mortgage is invalid, to shew that the attachment which invalidated it was in force.] Not at this stage of the inquiry, the point never having been taken in the Courts below. See *Anandlall Das* v. *Julodhur Shaw* (1) and *Bank of Bengal* v. *Nandlal Das* (2).

Cowell replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

In this case the Appellant sued on a mortgage title, completed, as he alleged, by foreclosure under Reg. XVII. of 1806, sect. 8, to recover possession of the property in suit from the Respondent, who held it as purchaser at an execution sale in a suit against the mortgagor. The mortgage deed was in the English form, with a power of sale. Inasmuch as it was sought to be enforced in the mofussil, the procedure prescribed by the regulation has been applied to it as if it were a mere bye-bil-wafa, or deed of conditional sale. The suit is the ordinary suit which in such cases the mortgagee who has foreclosed is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, viz., that it is brought against the purchaser under the execution sale as well as against the mortgagor, and that the former is the substantial Defendant.

In such a suit the Plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title or to the proceedings in foreclosure may be taken.

The Respondent was one of a firm of builders who, in December 1872, sued one *Surfunnissa Begum*, as the daughter of *Moonshi Busloor Ruheem* and the representative of his estate by virtue of a certificate under Act XXVII. of 1860, for the amount claimed as due to them for work done partly in the lifetime of *Busloor Ruheem* and partly after his death. On the 10th of December,

(1) 14 Moore's Ind. Ap. 543, 549. (2) 12 Beng L. R. 509.

1872, they applied for and obtained, under sections 84 and 85 of the *Civil Procedure Code*, an attachment before judgment, in order to secure the property. Mr. *Doyne* took objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by sect. 81 and the subsequent sections having been adopted. But, in their Lordships' opinion, it must be taken that, as between *Surfunnissa Begum* and the Plaintiffs in this former suit, there was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd of January, 1873, which was made when part of the property which had been attached was released from the attachment on the payment of part of the Plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property which is the subject of this litigation.

In these circumstances *Surfunnissa Begum*, on the 20th of May, 1873, executed the mortgage under which the Plaintiff claims; and the principal question raised by this appeal is whether that alienation of the property was not, by reason of the attachment, null and void as against the attaching creditors and those deriving title under them. The decree in that suit was made on the 13th of September, 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part of the Appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the Respondent cannot claim the benefit of the former attachment. Upon this point the learned Judges of the High Court say:—"The attachment never was removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued) at the time it was attached and sold in execution of the decree." Their Lordships must, therefore, assume that, although where property has been attached before judgment it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there were, as their Lordships think there was, a valid and subsisting attach-

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ment at the date of the mortgage, that alienation, unless it can be shewn not to fall within the provisions of the 240th section, was null and void as against the attaching creditor and those who claim under him.

Hence, the determination of this appeal depends very much upon the point which has been ingeniously raised and argued by the learned counsel for the Appellant, and particularly by Mr. *Cowell*. It is said that sect. 240 does not govern the case for the following reasons. That section runs thus: "After any attachment shall have been made by actual seizure or by written order as aforesaid, and in the case of an attachment by written order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise," and so on, "shall be null and void." It is contended that the words "after it shall have been duly intimated and made known in manner aforesaid" incorporate into the 240th the provisions of the 239th section, which says, "In the case of lands, houses, or other immoveable property the written order shall be read aloud at some place on or adjacent to such lands, houses, or other property, and shall be fixed up in some conspicuous part of the Court house; and when the property is land or any interest in land, the written order shall also be fixed up in the offices of the Collector of the zillah in which the land may be situated." Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the Plaintiff, who was seeking to oust the Defendant from possession to prove the non-observance of the formalities in question, rather than for the Defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below, and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had

ceased to be a valid and subsisting attachment at the time the mortgage was made. It is in these words: "That their Lordships ought to have held that, even if the said property was legally attached before judgment, such attachment had ceased to be a valid and subsisting attachment under sect. 85 of the Act." In the case which has been cited from the *Weekly Reporter*, vol. x., it is clear from the judgment of Mr. Justice *Macpherson*, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place. Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further inquiry into the matter under the powers which its procedure gives them. Upon this record they think the judgment of the High Court was right, and will therefore humbly advise Her Majesty to affirm that judgment and to dismiss this appeal. The costs of this appeal will follow the result.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondents: *Wrentmore & Swinhoe.*

J. C.* 1880 March 3, 4, 5.

ADRISHAPPA BIN GADGIAPPA . . . . DEFENDANT;

AND

GURUSHIDAPPA BIN GADGIAPPA . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Desai—Deshgat Watan—Partibility—Onus probandi.

Deshgat watan, or property held as appertaining to the office of desai, is not to be assumed *primâ facie* to be impartible. The burden of proving impartibility lies upon the desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies.

A decree for partition of such property should be without prejudice to the desai's right to such emoluments or allowances for the performance of the duties of the desaiship as he may be entitled to under any law in force.

APPEAL from a decree of the High Court (July 28, 1875), rereversing a decree of the Political Agent, Southern Mahratta country (March 11, 1874), and awarding to the Respondent half of the property claimed by him. The Appellant and Respondent were brothers, and the question involved was whether the property in dispute, which is a deshgat watan, or property attached to the office of a desai, who was formerly the officer employed in the superintending the collection of the Government revenue and other duties, is impartible or not.

The facts of the case appear in the judgment of their Lordships.

Graham, and *Kenelm Digby*, for the Appellant.

Leith, Q.C., and *Mayne*, for the Respondent.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case a suit was instituted by two younger brothers against their elder brother, all being members of a joint Hindu family, whereby the younger brothers claimed two-thirds of the

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Inam village of *Konoor*, which is admitted to be that part of a deshgat watan, or property held as appertaining to the office of desai, which lies within what is, strictly speaking, British territory; the rest of the watan being within the territory of the feudal chief of *Jamkhandi*, in the Southern Mahratta country. The elder brother insisted that, inasmuch as he held the office of desai, and this property belonged to his office, he was entitled to hold it as impartible, subject to the customary right of his brothers to receive allowances by way of maintenance. The action was brought in the year 1861, in the Court of the Political Agent, and through a lamentable delay, as their Lordships cannot help thinking it, of successive political agents, was not decided in first instance until the year 1874. The effect of the decision of the Political Agent, whose judgment was for the Defendant, may be stated to be this: that the property appertaining to a desaiship must be assumed *primâ facie* to be impartible, and that sufficient evidence had not been given of its partibility. This judgment on appeal was reversed by the High Court, who laid down a different rule or rather presumption of law. The effect of the judgment of the High Court was, that there is no such general presumption in favour of the impartibility of estates of this kind as to shift the burden of proof in the manner which the Political Agent supposed; that in such cases the burden of proof is upon the desai, who seeks to shew that the property devolves upon him alone, in contravention of the ordinary rule of succession, according to the Hindu law. The High Court further came to the conclusion that no sufficient evidence had been given by the Defendant either of family custom or of district custom to prevent the operation of the ordinary rule of law whereby the property would be partible. The question in the cause, in a great measure, depends upon which of these two views of the law is right. Their Lordships are of opinion that the High Court was right; that there is no general presumption, as has been contended for on the part of the Appellants, which shifts the burden of proof; and that it lies upon the Defendant, who seeks to shew that the estate is impartible, to give evidence of the special tenure of the watan, or of either family custom or of district or local custom sufficiently strong to robut the operation of the

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general law. Their Lordships have also come to the conclusion that the High Court was right in the opinion which they formed that the evidence given in this case was insufficient.

The High Court intimate that the contention with respect to a family custom was abandoned in the argument before them; but be that as it may, their Lordships are of opinion that no such family custom has been proved. A pedigree has been put in whereby it appears that, as far back as the year 1780, the watan, which had been resumed at that time by the Native Government, was conferred on or restored to one *Gurushidappa;* but inasmuch as *Gurushidappa* appears to have been an only son, that devolution of the property throws no light upon the question in dispute. From *Gurushidappa* it appears to have devolved, in 1814, upon his only son *Gadgiappa.* Subsequently, in 1836, the desaiship devolved upon *Adrishappa,* the present Defendant. It would appear that his family, consisting of himself and his two brothers, remained joint until the year 1854, when, for the first time, a dispute arose, and the younger brothers claimed the shares which they claimed subsequently in this suit. It appears to their Lordships that this state of things throws very little light upon the controversy; it certainly does not support the contention of the Defendant that he was entitled to the possession of the property as impartible, giving his brothers only maintenance.

An official document has been put in, bearing date 1800, being an official account of certain desaiships then under sequestration by the Government, whereby it would appear that a sum of Rs.150 per annum, payable out of the watan, had been allotted to one *Kadappa,* who seems to have been a distant cousin of *Gurushidappa.* It further appears that that allowance has continued up to the present day to be enjoyed by a descendant of this *Kadappa;* and that a similar allowance is enjoyed by another member of the family, descended from a common ancestor with the parties to this cause. That circumstance, however, of itself, and without further explanation, does not appear to their Lordships sufficient to maintain the contention of the Defendant. These two members of the family, who are said to be still living and to receive the allowances, might have been called, and they might, if the case of the Defendant is correct, have shewn the origin of their allowances,

and possibly that there had been some previous custom in the family whereby the eldest son took the property, subject to allowances to his younger brothers, or to other members of the family. Even such evidence, it may be remarked, if forthcoming, would presumably have related to a period anterior to the re-grant of the watan to *Gurushidappa* in 1780. But, in the absence of any such evidence, their Lordships are not disposed to attach much weight to this mere entry in the account. Beyond that there is no evidence.

Their Lordships, therefore, are of opinion that the High Court was right in determining that there was no evidence in this case of family custom one way or the other.

With respect to the custom of the district, although the evidence may shew that tenures of this kind are more frequently impartible than partible, it is not, in their Lordships' opinion, of that conclusive character which is necessary to establish a general district custom. They are of opinion that the High Court was justified in finding that no sufficient evidence of such a district custom had been given.

Their Lordships may observe that in the year 1854, upon the brothers quarrelling, the case came before the chieftain of *Jamkhandi* in respect of that part of the watan which is in his territory. He, in the first instance, decided in favour of the Defendant; but subsequently, some years after, upon receiving evidence, which he appears not to have done before, decided in favour of the Plaintiffs. That decision, although it was subsequently set aside by the Secretary of State on the ground that, for the special reason stated in his despatch, the chief had no jurisdiction in the matter, may be invoked by the Plaintiffs as, at all events, some evidence in their favour.

On the whole, therefore, their Lordships have come to the conclusion that the High Court was right in the view which they took of the law and of the burden of proof, and of the proof itself, and that their decision *quoad* the partibility of this property should be confirmed.

A difficulty which their Lordships have felt in the case, and to which the High Court have not adverted, is the following: The Defendant held the hereditary office of desai, and the watan is

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admittedly property appertaining to the office; and it appears to have been the policy of the Indian Government that desaiships should be maintained, and that the desai himself should be enabled to perform the functions of his office, be they greater or less, properly and in a manner suitable to his position as a subordinate officer, and to some extent a representative, of the Government. This policy has been recognised and enforced by various Acts of the Legislature, the latest being apparently Act No. III. of 1874 of the Legislative Council of *Bombay*. The provisions of that statute seem to be in some degree retrospective.

Hence, although the decision of the High Court is in substance right, their Lordships think that it should be accompanied by a declaration that the decree is to be without prejudice to the Defendant's right to such emoluments or allowances for the performance of the duties of the desaiship as he may be entitled to under any law in force. And, accordingly, they will humbly recommend to Her Majesty that such a declaration be added to the decree of the High Court; but that, subject thereto, the said decree be affirmed. They also direct that the costs of this appeal be taxed; that the amount of such costs, when taxed, be added to the costs of the cause, and paid with them out of the estate.

Solicitors for the Appellant: *Ashurst, Morris, & Co.*
Solicitors for the Respondent: *Ramsden & Austin.*

HIRA LALL . . . . . APPELLANT;

AND

BUDRI DASS AND OTHERS . . . . . RESPONDENTS.

J. C.*
1880
March 9.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WESTERN PROVINCES.

Limitation—Act XIV. of 1859, *s.* 20—*Jurisdiction of the Court enforcing Decree.*

A proceeding to enforce a decree, taken *bonâ fide* and with due diligence before a Judge whom the party, *bonâ fide* though erroneously, believes to have jurisdiction, is a proceeding within the meaning of sect. 20, Act XIV. of 1859; whether the Judge actually decides that he has jurisdiction, or supposing himself to have jurisdiction acts accordingly.

Roy Dhunput Singh v. Mudhomotee Dabia (1) commented upon.

APPEAL from a judgment of the High Court (May 25, 1877) affirming a judgment of the Judge of *Agra* (May 31, 1876), and allowing the objections of the Respondents to the execution of a decree obtained against them by the Appellant and one *Makhar Lall*, deceased, on the 14th of January, 1867 in the Court of the Judge of *Agra*.

The facts of the case appear in the judgment of their Lordships.

Graham, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The question in this case is whether the judgment creditors, who on the 14th of January, 1867, obtained in the Court of the Judge at *Agra* a decree against the Respondents, were on the 9th of April, 1874, barred by limitation from executing it. It appears that on the 3rd of December, 1868, the Judge sent the decree to

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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the Subordinate Judge of the district to be executed by him, and that on the 3rd of April, 1869 the Subordinate Judge struck the execution case off the file. On the 9th of April, 1874, the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

Between the 3rd of April, 1869, when the Subordinate Judge struck the case off his file, and the 9th of April, 1874, proceedings were from time to time taken by the decree holders in the Court of the Subordinate Judge to enforce the decree, but the question is whether those proceedings were sufficient to prevent the operation of the *Limitation Act* XIV. of 1859, sect. 20.

It appears that on the 18th of February, 1870, an application was made by the decree holders to the Subordinate Judge to set off a debt of Rs.1300, which they owed to a debtor of the Respondents, against so much of the amount due to them under the decree, and the Subordinate Judge made an order that the application should be granted, that the decree holders should file a receipt for Rs.1300, and that the case should be struck off the pending file. On the 18th of February, 1870, therefore, the Subordinate Judge made an order by which a portion of the debt, to the extent of Rs.1300, was satisfied. Subsequently on the 8th of January, 1872, an application was made to the Subordinate Judge to send a certificate of the decree to the political agency at *Indore* in order that the decree might be executed there, whereupon he made an order that the Judge should be requested to send the record of the execution of decree; but inasmuch as an interval of more than one year had elapsed since the last order it was necessary, under sect. 216 of Act VIII. of 1859, to serve the judgment debtors with a notice, in order that they might, if they could, shew cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post, they living out of the jurisdiction of the Court, but it was returned, as the judgment debtors were not found. That was on the 2nd of April, 1872. The Subordinate Judge held that that was not a sufficient service upon the Defendants, and ordered the case to be struck off the file of pending cases. On the 3rd of May, 1872, he made an order: "That a notice be sent to the judgment debtors by post in a registered cover, fixing the 18th day of May as the

date for shewing cause, and that the case be brought forward on the said date." On the 30th of May, 1872, the Nazir of the Court made the following report: "In this case a notice in a registered cover was sent by post to the judgment debtors. The cover has been returned to-day by the post, open. The cover has a slip attached thereon, in which it is written, in Hindi, that *Buddri Nauth*, treasurer (that is one of the judgment debtors), refuses to take it. Therefore the cover in question is submitted with this petition." On the 3rd of June, 1872, the case again came before the Subordinate Judge, upon which he made the following order: "The case having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment debtors at *Indore*, but the judgment debtors not having received the cover, it was returned. The judgment debtors not having taken the cover containing the notice, it must be considered as having been served." It is therefore ordered: "That a report be endorsed on the decree, and made over to the decree holders' pleader, that he may sue out execution in a competent Court, and recover the amount of his decree, and that the case be struck off the pending file."

Afterwards, on the 24th of December, 1873, upon a report of the Mohurrer that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judge's Court. Subsequently, on the 9th of January, 1874, in a proceeding from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by sects. 285 and 286, Act VIII. 1859, and copy of the application for execution of decree, be sent to the agent at the *Indore* Cantonment." On the 9th of April, 1874, the case was re-instituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until the 3rd of June, 1872, that the decree holders had a certificate on which they had not acted and they prayed the Court that under sect. 237 certain 4 per cent. promissory notes for Rs.25,000 due to the judgment debtors in the *Indore* Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a

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sum of Rs.13,097, belonging to the judgment debtors, and that money was sent to the Judge at *Agra* by means of a bill. On the 13th of May, 1876, the Judge, having received the money from the *Indore* Agency, ordered that the Rs.13,097. 7*a*. 9*p*. be given over to *Meer Jaffar Hosein*, pleader for the decree holders, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, in which the Defendants made the following objection, amongst others: "1. That the decree holders' decree is beyond time." Thereupon the Judge, on the 18th of May, 1876, made the following order: "The objections are such as may be entertained, and may possibly be determined in favour of the debtors. It appears, therefore, undesirable that the decree holders should get the money till they have been disposed of. Let payment be stayed on the debtors giving security to pay interest at eight annas per mensem per cent., in the event of the money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree holders, an injunction may be issued to the bank on which it is drawn, not to cash it till further orders." Then comes the decision of the 31st of May, 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires*, and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorized by law, and that when the Subordinate Judge removed the case from his files he could not take it up again without a fresh transfer. He also considered that the decree holders had not shewn due diligence in the case, and doubted whether any of the proceedings were *bonâ fide*. He, therefore, held that he was constrained to grant the prayer of the objectors, and to award them costs.

The execution creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the Appellants had not exerted themselves *bonâ fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorized him to take up and dispose of the application then pending, and not the subsequent applications

which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the applications to and orders of the Subordinate Judge if he had had jurisdiction would have been sufficient to prevent the operation of the *Statute of Limitations*, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. Section 14 of Act XIV. of 1859 enacts: "In computing any period of limitation prescribed by this Act the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same Defendant or some person whom he represents *bonâ fide*, and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which on appeal shall have been annulled, for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from any such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating *bonâ fide* and with due diligence before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of sect. 20 of Act XIV. of 1859, with regard to executions. Section 20 says: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment decree or order of such Court unless some proceeding shall have been taken to enforce such judgment decree or order, or to keep the same in force, within three years next preceding the application for such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bonâ fide* and with due diligence before a Judge whom the party *bonâ fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of sect. 20.

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In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment debtors had appeared before the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if he had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within the meaning of sect. 20. They ought equally to be so, though the judgment debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Roy Dhunput Singh* v. *Mudhomotee Dabia* (1). There, "an execution sale was stayed by consent for two months, and the execution suit was struck off the file. During that period the execution creditor applied to the Court to restore the execution suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment debtor in another suit, alleging that he (the executing creditor) had attached them; but it turned out that he had attached them in another suit. Held, the application being *bonâ fide*, that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said: "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceedings. If their Lordships could infer from these facts that the petition was a colourable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion." They therefore came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of the 20th section of Act XIV. of 1859.

On the whole, therefore, their Lordships have arrived at the

(1) 11 Beng. Law Rep. 23.

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conclusion, and will humbly advise Her Majesty, that the decree of the High Court was erroneous, and that it be reversed; that in lieu thereof an order be made reversing the order of the Judge of *Agra* of the 31st of May, 1876, and ordering that the Rs.13,097. 7*a*. 9*p*., with such interest as they may be entitled to under the order of the 18th of May, 1876, be paid to the decree holders; and that the Appellants have the costs in all the Lower Courts subsequent to the petition of objection of the 18th of May, 1876, and the costs of this appeal.

Solicitors for Appellants: *Watkins & Lattey.*

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Feb. 19, 20.

KARUNABDHI GANESA RATNAMAIYAR . DEFENDANT;

AND

GOPALA RATNAMAIYAR AND RANGAIYAR PLAINTIFFS.

KARUNABDHI GANESA RATNAMAIYAR . DEFENDANT;

AND

RAMARATNAMAIYAR AND ANOTHER. . . PLAINTIFFS.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Adoption—Invalid Consent of Sapindas.

Where a Hindu adopted a boy without authority from her husband, and the consent of the sapinda had been obtained to an adoption purporting to be made in pursuance of an alleged authority, and had been influenced by undue considerations:—

Held, that such adoption was invalid.

CONSOLIDATED APPEAL from two decrees of the High Court (April 10, 27, 1877).

The first suit was brought (13th of November, 1874) by three brothers against their elder brother and other persons, including the Appellant, for a division of the family property, and for

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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a decree setting aside the adoption of the Appellant. The First Court ordered that the name of the first Plaintiff should be struck out, and the suit proceeded to a final decree on account of the two remaining Plaintiffs. The second suit was preferred by the brother who was so excluded from the first suit.

By the original plaint the three brothers claimed a partition of the family property, and to have three-fourths thereof allotted to them as their shares.

The pedigree is as follows: *Venbaya* and *Subbarayar* were first cousins, and were down to the death of the latter in joint possession of the estates in suit. *Venbaya* left behind him *Sawmi Aiyar*, his eldest son by one wife, and the Respondents, his sons by another wife. *Subbarayar* left behind him a sister married to *Sawmi Aiyar* and a widow *Rangammal*, who adopted the Appellant, the son of *Sawmi Aiyar*. As *Subbarayar* died without male issue, *Venbaya* succeeded at his death to the whole of the estates in suit by right of survivorship, and consequently *Sawmi Aiyar* and the three Respondents were entitled on his death to equal fourth shares thereof. If, however, the adoption were held good, the adopted son would take his adoptive father's moiety of the estate by inheritance, and *Sawmi Aiyar* with the three Respondents would take the other moiety, that is each one-eighth of the whole.

The question in the appeal was whether the adoption of the Appellant by *Rangammal* the widow of *Subbarayar* was valid to confer on him the *status* of adopted son of *Subbarayar*, and thereby to divest the Respondents of that part of the joint estate which in his lifetime belonged to *Subbarayar*, and on his death long before suit passed by right of survivorship to his cousin, the father of the Respondents. On behalf of the Appellant an oral permission to adopt from *Subbarayar* to his widow was relied upon, and also in accordance therewith a permission granted about eighteen or twenty years subsequently by his sapindas.

The Courts below concurred in holding that no oral permission had been given. They also concurred in holding that the *factum* of adoption by the widow was established, but that it was invalid to confer on the Appellant the *status* of an adopted son of *Subbarayar*.

The Judge was of opinion that the only person of those alleged to have given consent to the adoption who stood in the relation of sapinda was the Appellant's father *Sawmi Aiyar*, the eldest brother of the Respondents, but that according to decided cases (1) his consent was sufficient, notwithstanding "grave social objections to that rule," but that the adoption was bad on another ground (namely) that the mother of the Appellant was a daughter of the sister of *Subbarayar*, whom he could not, according to Hindu law, have married, and that therefore her son could not become his adopted son.

The High Court differed from the Judge on both those questions of law, holding, as to the adoption by consent of relatives, that it had not been shewn to have been made in good faith and for the spiritual benefit of *Subbarayar*, but to promote the interests of the living and chiefly of the father of the Appellant himself, and that the evidence as to obtaining the consent was not satisfactory to shew that an authorization was sought "as from a kinsman having full power to grant or withhold permission," and that "according to several of the witnesses the widow spoke and acted as one already possessed of authority from her husband which she was about to execute, and consent was asked to its execution." And as to the effect of the consanguinity of the Appellant's mother to *Subbarayar*, the High Court, without formally deciding it, threw out the opinion that a sister's daughter is a non-sapinda, and therefore a person with whom *Subbarayar* might have intermarried.

The result was that the adoption was declared invalid by both Courts, and the Plaintiffs declared entitled in the aggregate to three-fourths of the whole joint estate, instead of three-eighths to which the Appellant's claim would have limited their interests.

Mayne, for the Appellant, contended that the adoption was valid. The Appellant was the nearest adoptable sapinda, the consent was given by the managing member of the family, and no corrupt motive in giving it was proved. The long delay in adopting was immaterial. Reference was made as to the last

(1) See the *Ramnad Case*, 12 Moore's Ind. Ap. Cas. 441; *Sri Raghunada* v. *Sri Brozo Kishoro*, Law Rep. 3 Ind. Ap. 154; Ibid. 191.

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point to *Rája V. A. Nimbalkar* v. *Jayavantrao M. Ranadive* (1); *Morley's* Digest, p. 18; *Sree Brijbhookunjee Muhuraj* v. *Sree Gokoolootsaojee Muhuraj* (2). On the question as to purity of motive in giving consent and the effect of consent, see the *Ramnad Case* (3); *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (4); *Sri Raghunada* v. *Sri Brozo Kishoro* (5). Fraud must be proved affirmatively, see *Motee Lal Opudhiya* v. *Juggurnath Gurg* (6). Here the circumstances did not warrant a finding of fraud by the managing member either upon his brothers or the adopted boy.

Leith, Q.C., and *Doyne*, for the respondents, contended that the adoption was invalid. *Sawmi Aiyar's* consent was not sufficient. Upon the evidence it was made from interested motives, and, moreover, it was given to an adoption purporting to be made by the widow in pursuance of an alleged authority from her husband, and not to one to be authorized or otherwise at their independent discretion by the sapindas. It lay upon the Appellant to shew that the manager gave his consent in his representative character, and that he was entitled to bind, and did bind, the family and other sapindas by so doing. That was not shewn, and it was also not proved that there were no other sapindas capable of giving consent, but whose consent was not obtained. The assent of the Respondents or of their guardian ought to have been obtained. Nor was there any evidence that the circumstances of the case had been considered before the assent was given. The assent was given from interested motives. Reference was made to *Vyavahara Mayukha*, ch. iv. v. 17, *Stokes'* Hindu Law, p. 63; *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (7).

As to the validity of the supposed marriage between *Subbarayar* and his half-sister's daughter, see *Menu*, c. iii. v. 5.

Mayne replied, citing *Ramasawmi Iyen* v. *Bhagity Ammal* (8),

(1) 4 Bombay H. C. R. (A. C. J.) 191.
(2) 1 Borrodale, 181.
(3) 12 Moore's Ind. Ap. Ca 397.
(4) Law Rep. 4 Ind. Ap. 1.
(5) Law Rep. 3 Ind. Ap. 154.
(6) 1 Moore's Ind. Ap. Ca. 1.
(7) Law Rep. 4 Ind. Ap. 13.
(8) 8 Mad. Jur. 58.

and on the last point, as to the validity of the supposed marriage, cited Dattaka Mimamsa, s. 2, v. 57; *Strange's* Hindu Law, p. 101. The forbidden affinities are five degrees counting from the common ancestor. Here the sister's daughter is within them, but the rule against adoption at that distance is not strictly applied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The validity of the adoption in question in this appeal is disputed upon several grounds: first, that the widow of *Subbarayar* had no authority from her husband to adopt; secondly, that she had not got the assent of the sapindas to the adoption; and, lastly, that *Subbarayar*, her deceased husband, could not have married the mother of the adopted boy, that is, his half-sister's daughter, and, consequently, that the adoption of the child was invalid.

Both Courts found that the widow had no authority from her husband to adopt, and their Lordships will not disturb that finding. The first Court held that *Subbarayar* could not legally have married his sister's daughter, but the High Court entertained a different opinion upon that point. It is unnecessary for their Lordships to express any opinion upon it, and they therefore abstain from doing so; but, at the same time, they feel bound to say that they are not satisfied with the reasons which the learned Judges of the High Court have given for holding that *Subbarayar* could have married the mother of the boy, she being the daughter of his own half-sister.

The case turns upon the question of the assent which was given by *Sawmi Aiyar* to the widow to adopt. Their Lordships do not consider it necessary to give an express opinion as to whether *Sawmi Aiyar* could alone have given a valid assent if it had been given to her as a widow having no authority from her husband to adopt, and had been given without his mind having been influenced by other and undue considerations, because their Lordships are of opinion that, looking to the circumstances of the case, there is no sufficient evidence to shew that the widow applied to *Sawmi Aiyar* to give his assent to an adoption to be made by her

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without the authority of her husband, but rather that she applied to him to give his son to be adopted by her under an authority which she had from her husband. The Judges of the High Court expressly say: "But if we endeavour to ascertain whether *Rangammal*, as a widow not having authority from her husband, sought for and obtained his kinsman's authority to adopt a son to him, the evidence appears to give no certain answer. According to several of the witnesses, the widow spoke and acted as one already possessed of authority from her husband which she was about to execute, and consent was asked to its execution in favour of *Karunabdhi Ganesa Ratnamaiyar*. There is little, if any, satisfactory evidence to shew that an authorization was sought as from a kinsman having full power to grant or withhold permission."

Their Lordships are of opinion that that remark was well founded, and that there is no evidence to shew that the widow applied to *Sawmi Aiyar* to give his assent to her adopting because she could not adopt without his consent; but that the evidence shews she applied to him to give her his child in order that she might adopt him in pursuance of an authority which she had from her husband, which she represented herself to possess.

It is said that, although it is alleged in the widow's part of the agreement that she wished to adopt a son in pursuance of a permission given to her by her husband, there is no such statement as that in the agreement executed by *Sawmi Aiyar*; but when the agreement of *Sawmi Aiyar* is looked at, he expressly refers to the agreement which had been signed by the widow; he says, "I, as guardian, shall, according to the agreement executed by you, &c." Therefore he refers to the agreement which is said to have been executed by the widow, and adopts the statements made in it; namely, that she was proposing to adopt a son in pursuance of a permission given by her husband. The application to *Sawmi Aiyar* was not to give his consent to an adoption which the widow could not make without the assent of the sapindas, but it was an application to give his son to be adopted in conformity with an authority which she had received from her husband.

But, independently of that, it appears that *Sawmi Aiyar's* mind must have been influenced by the arrangement which he made

with the widow. *Sawmi Aiyar* does not give his consent to an adoption merely, but he stipulates with the widow that if she adopt he is to become the guardian of the child. He says: "I, as guardian, shall, according to the agreement executed by you, look after all the real and personal properties due therein to the share of your child, and deliver them as soon as your adopted son attains proper age." The widow also says: "And whereas the said child is a minor, and you, as the managing member of the joint family, are looking after all the moveable and immoveable properties, &c., you, as guardian, shall look after all the real and personal properties due therein to the share of my said child until he attains proper age, and then deliver the same to him with an account of incomes and expenses."

In the absence of an adoption, *Sawmi Aiyar* would have been entitled upon partition to only one-fourth of the property—he being a member of a joint family with his brothers,—and his brothers would have been entitled to the other three-fourths; but if a valid adoption should be effected the adopted son of *Subbarayar* would become entitled to half the property, viz., the half share which belonged to the deceased husband of the widow; and the brothers, instead of each being entitled to one-fourth, would be only entitled to an eighth. *Sawmi Aiyar* himself would, of course, lose a portion of the share, which would pass to the adopted son; but then he stipulated that he should remain guardian of the adopted son, so that until he should attain his full age no partition between himself and the adopted son could have been enforced, because he was the guardian; the widow could not have asked for a partition in the name of her son, because he had stipulated that *Sawmi Aiyar* should be his guardian. The consequence was that by the arrangement made with the widow he really got during the minority the management of, and the interest in as a member of the joint family (which, if a partition with his brothers should take place, would consist of himself and the adopted son), five-eighths of the estate. The brothers might have separated, but still the infant who was adopted could not have separated from *Sawmi Aiyar* without bringing a suit against the latter for a partition; and to such a suit the guardianship for which *Sawmi Aiyar* had stipulated as

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part of the consideration for giving his consent to the adoption would have presented exceptional obstacles.

There is another matter by which his mind was probably influenced. It is stipulated in the deed that "my adopted son has nothing to do with the village of *Erikkolam* in the talook of *Musori* obtained by you, the same being the acquisition of your maternal grandfather." By reason of this stipulation the adopted son was to take no interest in that portion of the estate which was then claimed by *Saromi* as his separate property, but is now found to be a portion of the joint family property.

Their Lordships, looking at all the circumstances under which the assent was given, are of opinion that the assent was not one which rendered the adoption valid and binding as against the brothers; and their Lordships will therefore humbly advise Her Majesty that the decision of the High Court be affirmed, and that the Appellant pay the costs of this appeal.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle.*
Solicitors for the Respondents: *Burton, Yeates, & Hart.*

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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Mitakshara Law—Wills—Father unable to make an Unequal Distribution of Ancestral Property—Alienation of Undivided Share cannot be by Will—Limitation—Res Judicata.

Under the Mitakshara law as received in *Bombay*, a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons.

Although one of several coparceners has under the same law the power of alienating his undivided share in ancestral estate without the consent of his co-sharers by deed executed for valuable consideration; and although such share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment debtor, yet such alienation cannot be made by will.

Quære, whether any distinction can be drawn between a gift and a devise of such share in favour of the validity of gifts. Their Lordships are not disposed to extend such power of alienation beyond the decided cases, which rest not on an admitted principle of Hindu law, but on an exceptional doctrine established by modern jurisprudence. In *Bombay* such cases are adverse to the validity of gifts.

A demurrer having been allowed to a suit for partition by a son against his father and brother, on the ground that as regards the immoveable property the Court had no jurisdiction, and that as regards the moveable property he could not assert his rights therein, according to Mitakshara law, during his father's lifetime; such order is not an adjudication between the brothers as to their rights in the joint ancestral estate, and therefore is no bar to a fresh suit for partition after the father's death.

Such suit is not barred by limitation as regards the immoveable property, when it appears that the Plaintiff has been all along in possession of a portion thereof. Assuming that the moveable property might be treated as distinct, and that the Plaintiff had received no payment thereout during the statutable period:—

Held, that the Defendant having had the benefit of the order on demurrer as a valid adjudication against the Plaintiff's right of suit in his father's lifetime, was estopped from setting up the statute as a bar, and from insisting that such order could have been appealed from as erroneous in law, and that therefore it did not suspend the running of the statute.

APPEAL from a decree of the High Court of *Bombay* (Aug. 2, 1876) affirming all the findings upon which a decree of the Sub-

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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ordinate Judge of *Belgaum* (Jan. 8, 1875) had been based, but varying the same by directing that in lieu of awarding a fixed sum of money, Rs.71,412, to the Respondent, there should be a decree for partition and account.

The suit was brought by the Respondent for a partition of family property, and to set aside a will whereby his father had substantially disposed of the whole of the undivided ancestral property in favour of the Appellant, his second son, thereby disinheriting his elder son, the Respondent. Both Courts decided that this will was invalid and illegal, and decreed to the Respondent one half of the family property.

The facts of the case are set out in the judgment of their Lordships. The principal questions of law which arose in the suit were three:—

1st. Under the law of the Mitakshara can a father make a valid will of ancestral moveable estate wholly in favour of one son?

2nd. Assuming that in this case he had not the power of doing so, was the Respondent barred by limitation (Act XIV. of 1859, sect. 1, cl. 13) by reason of his having ceased to be joint with his father and brother, and to receive from them, or either of them, any payment on account of his alleged share for more than twelve years before his father's death?

3rd. Was the Respondent barred from bringing this suit by reason of the decision of the Supreme Court (Aug. 30, 1861) in a suit brought by him against his father and the Appellant, to obtain partition of the same estate?

Upon the question of Hindu law firstly above mentioned, the judgment (see Ind. Law Rep. Bomb. Ser. vol. i. p. 565) of the High Court (*Melvill* and *Kemball*, JJ.) was as follows:—

"The present suit has arisen in the *Southern Maratha* country, and there the first place, as an authority, is assigned to the Mitakshara, and a subordinate, though still an important one, to the Mayukha (1). In *Baboo Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee* (2), the Judicial Committee say, 'Decided cases, too numerous to be now questioned, have determined that the testamentary power exists' (among Hindus), 'and may be

(1) See *Krishnaji* v. *Pandurung*, 12 Bomb. H. C. 65.

(2) 12 Moore's Ind. Ap. Ca. 1.

exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*. Accordingly, it has been settled that even in those parts of *India* which are governed by the stricter law of the Mitakshara, a Hindu without male descendants may dispose, by will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject, perhaps, to the restriction that he cannot wholly disinherit any one of such descendants.' Their Lordships then refer to, but do not decide, the question whether a father can by will make an unequal distribution amongst his sons of immoveable property, whether acquired or ancestral. That case does not touch the question of ancestral moveable property; nor have we been referred to any case in favour of the father's right to make an unequal distribution of such property, except one reported, Marshall, 317. In that case a Bench of the *Calcutta* High Court said:—'By the Mitakshara law, applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property, and as the question was raised before us, we must declare that the ancestral property is only that actually acquired from ancestors, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property; for the income is the property of the tenant for life, to do what he likes with it. On the other hand, the father has it in his power to dispose as he likes of all acquired and all personal property.' No authority is given for this view of the Mitakshara law; and in a subsequent case, between the same parties, the first proposition contained in the above extract was most strongly dissented from by another Bench of the *Calcutta* Court. The case cannot, therefore, be treated as of much authority on the question before us, and we may discuss that question as if it stood clear of judicial decisions. The passages in the Mitakshara bearing upon the question are very fully and carefully discussed by Sir *Barnes Peacock*, in delivering the judgment of the Full Court at *Calcutta*, in *Raja Ram Tewary* v. *Luchmun Pershad* (1), a judgment which, it may be observed, proceeds upon a different view of the power of a son, under the Mitakshara, to compel a partition,

(1) 8 Suth. W. R. 15.

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from that expressed by the late Supreme Court at *Bombay* in the case already referred to: see also *Lalject Singh* v. *Rajcoomar Singh* (1). The author of the Mitakshara, after stating the arguments of his adversaries in paragraphs 18 to 22 of chapter I., sect. 1, proceeds to answer those arguments in paragraphs 23 to 26, and then in paragraph 27 he sums up his own conclusions as follows:—'Therefore it is a settled point that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth.' And again, in paragraph 9 of sect. 5 of the same chapter he says:—'So, likewise, the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grandfather; but he has no right of interference, if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependent.' And the reason is stated in the next paragraph,—'consequently the difference is this: although he have a right by birth in his father's and in his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but, since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction [if the father be dissipating the property].' Such are the provisions of the Mitakshara, which are similarly stated by Sir *Thomas Strange* (2). 'Even of moveables, if descended, such as precious stones, pearls, clothes, ornaments, or other like effects, any alienation, to the prejudice of heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his, and he has independent power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty, and purposes warranted by texts of law; while the disposals of the land, whencesoever acquired, must be in general subject to their control; thus, in effect, leaving

(1) 12 Beng. L. R. 373.

(2) Hindu Law, vol. i. p. 19.

him unqualified dominion only over personalty acquired.' The Mayukha (Chapter IV., sect. 1, paragraph 5) limits the power of the father even more strictly. 'As for this text the father is master of all gems, pearls, and corals, but neither the father nor the grandfather is so of the whole immoveable estate,' it also means the father's independence, only in the wearing and other [use] 'of ear-rings, &c., but not as far as gift or other alienation.' The above are the passages of the Mitakshara and Mayukha bearing upon the subject of alienation of ancestral moveable property, and it appears to us that their effect is to prohibit such a gift as that made by *Dada Naik* to the Defendant. We think it impossible to regard such a gift as 'a gift through affection,' prescribed by text of law. The gifts which such expression contemplates are probably gifts made by an affectionate husband to his wife (Mitakshara I., i., 20), the gift of affectionate kindred (Daya Kramasangraha II., ii., 26) gifts affectionately bestowed on a separated son, who has become divided before his brother's birth (Mitakshara I., VI., 13 to 15). It would be impossible to hold a gift of the great bulk of the family property to one son, to the exclusion of the other, to be a gift prescribed by text of law; for the texts which we next quote distinctly prohibit such an unequal distribution. The author of the Mitakshara (Chapter I., sect. 2, paragraph 1) after quoting the text of Yajnavalkya, 'When the father makes a partition, let him separate his sons from himself at his pleasure, and either dismiss the eldest with the best share, or (if he choose) all may be equal sharers,' goes on to say (paragraph 6), 'This unequal distribution supposes property by himself acquired. But of the wealth descended to him from his father, an unequal partition at his pleasure is not proper, for equal ownership will be declared.' And again, in paragraph 14, 'When the distribution of more or less among sons separated by an unequal partition is legal, or such as ordained by the law, then that division, made by the father, is completely made, and cannot be afterwards set aside, as is declared by *Menu* and the rest. Else it fails, though made by the father.' The rule is stated by Sir *Thomas Strange* (1) to be that, as to such parts of the estate as have been inherited by the father, whether real or personal, land or move-

(1) Hindu Law, vol. i. p. 123..

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ables, the division must be strictly equal; and this rule, he adds, is alike binding according to the doctrine of every school.

"From the above authorities, we come to the conclusion that it was not within the power of *Dada Naik* (whether his act be regarded in the light of a gift or of a partition) to bequeath the whole, or almost the whole, of the ancestral moveable property to one son, and virtually to disinherit the other. The will must, therefore, be set aside as wholly inoperative."

Leith, Q.C., and *Doyne*, for the Appellant:—

Upon the third question set out above referred to the report of the judgment of the Supreme Court relied upon, *Ramchandra Dada Naik* v. *Dada Mahadev Naik* (1), and contended that the decision then made, "that the father takes the moveable property absolutely," barred the present suit. Upon the point of limitation they referred to *Rajah Ram Tewarry* v. *Luchmun Pershad* (2); *Runjeet Singh* v. *Kooer Gujraj Singh* (3). Sect. 1, clause 13 of Act XIV. of 1859, must be construed so as to give twelve years from the death of the grandfather, in this case the person from whom the estate held in coparcenary by the father and sons descended. Further, the receipt by the Respondent of a large sum of money from his father and brother, and his exclusion from all further participation in the family estate for more than twelve years, establish against him either a partition in fact or a bar under the law of limitation, and in either view render the suit unmaintainable. Upon the first question it was contended that according to the Mitakshara law as to ancestral moveable estate, the whole of *Dada Naik's* share of the property in suit was at his own absolute disposition, and that at the least it could pass, and did pass, by his will to persons other than the Respondent. Reference was made to *Vallinayagam Pillai* v. *Pachché and Others* (4); *Virasvami Gramini* v. *Ayyasvami Gramini* (5); *Palanivelappa Kaundan* v. *Mannaru Naikan* (6); *J. Rayacharlu* v. *Venkataramaniah* (7); *Narottam Jagjivan* v. *Narsandas Harikisandas* (8).

(1) 1 Bomb. H. C. R. App. p. 76, *et seq.* p. 83.
(2) 8 Suth. W. R. 15.
(3) Law Rep. 1 Ind. Ap. 9.
(4) 1 Madras, 326.
(5) 1 Madras, 471.
(6) 2 Madras, H. C. R. 416.
(7) 4 Madras, H. C. R. 60.
(8) 3 Bomb. A. C. J. 6.

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Cowie, Q.C., and *Mayne*, for the Respondent, contended that the decree of the High Court was right. The decree of the Supreme Court was rightly held to be no bar, inasmuch as it merely decided that the suit in that Court was premature, that the cause of action relied upon had not then arisen. That judgment is in favour of the Respondent as a judicial decision against the present plea of a bar by limitation. As to whether Act XIV. of 1859, sect. 1, cl. 13, applies, see *Runjeet Singh* v. *Kooer Gujraj Singh* (1); *Govindem Pillai* v. *Chidambra Pillai* (2). Both Courts have found that there was no partition, and the cause of action was complete only at the father's death. At all events the Appellant, who relies on the Supreme Court judgment, is estopped from saying that the Respondent is barred by limitation.

As to the extent to which a father can under Mitakshara law dispose of his share, the cases shew that he may do so for valuable consideration, and that in favour of execution creditors the share of a coparcener may be assigned voluntarily or by operation of law. Allowing that a father may alienate his share for good consideration, it does not follow that he can do so by gift *inter vivos*, or, *à fortiori*, by will, which could not speak till after the right by survivorship had accrued. Reference was made to *Tarachand* v. *Reebram* (3); *Vitla Butten* v. *Yamenamma* (4); *Gangubai* v. *Ramanna* (5); *Vasudev Bhat* v. *Venkatesh Sanbhav* (6); *Udaram Sitaram* v. *Ranu Panduji and another* (7); *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (8); *Pauliem Valloo Chetty* v. *Pauliem Sooryah Chetty* (9); *Venkatapathy* v. *Lutchmee* (10).

Leith, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The Appellant in this case is the second, and the Respondent the eldest, son of one *Dada Mahadev Naik*, who died on the 13th of July, 1872. *Dada Mahadev Naik* was a son of *Mahadev*

(1) Law Rep. 1 Ind. Ap. 21.
(2) 3 Madras, 99.
(3) 3 Madras, 50.
(4) 8 Madras, 6, 12.
(5) 3 Bomb. A. C. J. 66.
(6) 10 Bomb. 139, 156.
(7) 11 Bomb. 76.
(8) Law Rep. 6 Ind. Ap. 88.
(9) Law Rep. 4 Ind. Ap. 109.
(10) 6 Madras Jurist, 215.

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Narayan Naik, who died in 1847, leaving another and eldest son called *Hurba*, and seven grandsons, four of whom were sons of predeceased sons, and three, namely, the Respondent, the Appellant, and a younger son, *Keshav*, were the sons of *Dada Naik*. All these persons after the death of *Narayan Naik* constituted a joint and undivided Hindu family, of which *Dada Naik*, his eldest brother *Hurba* being dumb, and therefore incapacitated, became the manager. By virtue, however, of subsequent partitions and other family arrangements the other members of the larger family became separate from *Dada Naik* and his three sons, who in the year 1857 were the only members of the joint and undivided family with which their Lordships have to deal.

The family property consisted of a family house at *Shahapoor*, in the *Southern Maratha* country, and of an ancestral business which was carried on partly there, and partly in a kotee at *Bombay*, which appears to have been managed by Gomashtas. About the year 1858 great dissensions arose between the Respondent and his father, the former claiming a right to take a larger share of the management of the business than his father was disposed to allow him. It is unnecessary to enter into the particulars of these disputes, but the result of them was that in 1858 the father and his two younger sons left the family house, the Respondent remaining there; and afterwards they, in the year 1864, built for themselves with the family funds another house at *Belgaum*.

Between the two last dates, and in March, 1861, the Respondent instituted a suit in the late Supreme Court of *Bombay* against his father and brothers, praying for a declaration of his rights in, and an immediate partition of, the ancestral property. The father demurred to the bill, and on the 13th of August, 1861, his demurrer was allowed. The effect of those proceedings their Lordships will afterwards consider.

In 1868 *Keshav Naik*, the youngest son, formally separated himself from the joint family, taking Rs.45,000 odd as his share in the joint estate, or the balance of it. The deed of release executed by him on the 16th of November of that year is in the Record, and it may be observed that it treats the old family house at *Shahapoor* as still part of the joint family estate.

The father afterwards made a will dated the 30th of October,

1871, whereby, after giving his account of what had taken place in the family, he treated his eldest son, the Respondent, as having received already more than his share of the estate, gave him only the house at *Shahapoor* and Rs.500, and gave all the rest of the property to his second son, the Appellant. He died, as has been before stated, in July, 1872.

In the following October the Respondent brought this suit against his brother, the Appellant. By it he claims to be entitled to one-half of the joint business and estate as it stood at the death of his father. Various defences were set up by the Appellant, and the issues as finally settled were the following:—

"1. Whether the suit is barred by sect. 2, Act VIII. of 1859" —that is, whether the decision of the Supreme Court on the demurrer amounted to *res judicata*. "2. Whether the suit is barred by clause 13, sect. 1, Act XIV. of 1859"—that is, whether it was barred by limitation under that statute. "3. Whether the property in suit is deceased *Dada Naik's* ancestral or self-acquired property. 4. If the former, whether Plaintiff has taken or received so much out of it as could be considered more than what he was entitled to for his share. 5. If the latter, whether the deceased *Dada Naik* made the original of exhibit No. 16, and to what sum is the Plaintiff entitled under it. 6. Whether the property left by the deceased *Dada Naik* is correctly estimated. 7. Whether the Plaintiff is restricted in getting his share on any other ground, as alleged by Defendant."

It was admitted at the bar that the findings of the Courts as to the 3rd, 4th, 5th, 6th, and 7th of these issues cannot now be questioned. It must, therefore, be taken that the property in question was ancestral; that the Respondent, the Plaintiff, has not received his full share of it; that the *factum* of the will has been established; and that there is nothing but the will and the two pleas in bar, the first and second issues, to defeat the Plaintiff's claim. Again as to the will, it is now conceded that under the Mitakshara law, as received in *Bombay*, by which this family is governed, a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons. It has, however, been contended that inasmuch as under the Mitakshara law a father and his sons are during his life joint

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coparceners in family estate, and that it has now been decided by the Courts in the South and West of *India* that one co-parcener may, by act *inter vivos*, make an alienation of his share which is binding on the others, it follows that he may dispose of his share by will. The result of this contention, which will be afterwards considered, is, if it is well founded, to reduce the property to be divided between the brothers to two-thirds of the joint property as it stood at the death of the father. The pleas in bar go, of course, to the whole claim.

Now, as to the first of these pleas, their Lordships have already intimated that it cannot be supported. It appears to them that all that was decided by the Supreme Court of *Bombay* in 1861 was that the Respondent could obtain no relief on his then bill, inasmuch as he had no right to compel his father in his lifetime to make a partition of moveable, though it might be ancestral, property; and that the Supreme Court had no power to make a partition of the immoveable property which was beyond the limits of its territorial jurisdiction. There is nothing, in their Lordships' opinion, which amounts to an adjudication between the brothers as to their rights in the joint ancestral estate on their father's death.

The plea of limitation is founded on the 13th clause of sect. 1 of Act XIV. of 1859, which is as follows:—

"To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property, and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended or on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the Plaintiff, or any person through whom he claims, by the person in possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be."

In considering the application of this enactment to the present suit, we may leave out all that relates to suits "for recovery of maintenance," and treat it as confined to a suit "to enforce the right to share in any property moveable or immoveable, on the

ground that it is joint family property." The section gives two periods from which the twelve years may be calculated; one is "the death of the person from whom the property alleged to be joint is said to have descended," and the other is "the date of the last payment to the Plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate."

It is contended that in this case, which is governed by the Mitakshara law, the person on whose death the property which is alleged to be joint has descended must be taken to be, not the father, in which case, of course, there would be no ground at all for the application of the *Statute of Limitations*, but the grandfather; on whose death the father and his sons all became coparceners in the property. It is possible, indeed, that on this construction it might be necessary to go back one or more generations beyond the grandfather in order to ascertain from whom the property descended, but for the present purpose it may be assumed that the property descended from the grandfather as the first acquirer of it.

Their Lordships agree with many of the observations made by Mr. Justice *Holloway* and Mr. Justice *Collett* in the case reported in the 3rd *Madras* High Court Reports, p. 99, as to the difficulty of applying this part of the clause in question to a joint family consisting of a father and sons governed by the Mitakshara law, though such difficulty would not exist in the case of a like family governed by the law of *Lower Bengal*. They are not prepared, however, to affirm that in this particular case the father may not be held to be "the person from whom the property alleged to be joint is said to have descended" within the meaning of the Act. The claim is twofold. It is to establish the right of the Plaintiff as a coparcener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to which he became entitled on his father's death by right of survivorship, and to have a partition on that basis. So far as the father's interest is concerned, the succession opened only on the father's death. Nor is it altogether clear upon the authorities how far the principle of inheritance as well as that of survivorship applies to such a succession by sons to their father. It may be observed, too, that this construction would receive some support from the arguments

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addressed to their Lordships upon the effect to be given to the will which proceeded upon the father's right of disposition over his undivided share. Their Lordships, however, do not think it necessary to decide, and do not decide, the question of limitation upon this construction of the clause in question.

Again, their Lordships think there is considerable force in the argument which the learned counsel for the Respondent have founded on the possession by the Respondent since 1858 of the family house at *Shahapoor*. How do the facts on this part of the case stand? The Respondent was, unquestionably, a member of the joint family, with the full rights of a coparcener, up to 1858. There is no suggestion of a formal partition between him on the one side and his father and brother on the other. He has ever since 1858 been in possession of the house at *Shahapoor*, which has, nevertheless, been treated on the occasion of the family arrangement which resulted in the separation of the youngest son, and to which the Appellant was a party, and also by the father when he made his will, as continuing to be joint family property. The contention of the Appellant and of his father seems to be embodied in the 4th issue in the suit, viz., that the Respondent had taken and received so much out of the joint family property as would be considered more than what he was entitled to as his share, and so must be taken to have lost his rights as a coparcener, as he would have done upon a formal partition. This issue has, however, been found by both Courts in favour of the Respondent, who must, therefore, be taken to be entitled to his full rights as a coparcener, except so far as he may be barred from asserting them by the *Statute of Limitations*. Now, so far as the immoveable property of the family is concerned, there seems to be no ground for the application of the statute. Not only has the Respondent all along been in the enjoyment of part of that property, viz., the house at *Shahapoor*, but, under the 14th section of the Act, he is entitled to exclude from the computation of the period of limitation the time occupied in the prosecution of the suit of 1861, inasmuch as the decision of the Court, *quoad* the immoveable property, proceeded on the ground of want of jurisdiction over it. There is, therefore, no bar in this case to a suit for the partition of the immoveable property of the family. Nor has there been a total exclusion from the joint family estate, as a whole, if that, as

suggested by Mr. Justice *Holloway* in the case above referred to, is necessary to lay the ground for the application of the statute at all.

It is argued, however, on the part of the Appellant that the claim is substantially a claim to share in the ancestral business and other moveable property, and that the right to do so has been barred by reason of the Respondent having received no payment thereout since 1858. Their Lordships will assume that the claim as to the moveable may thus be treated as distinct from that as to the immoveable property of the family, and that no payment out of the former has been established. They are, nevertheless, of opinion that the Appellant is in this case estopped by the proceedings of the Supreme Court of *Bombay* from setting up the statute as a bar to the Respondent's claim. They treat the order of the 30th of August, 1861, whether founded on a correct or an erroneous view of the law, as an adjudication, binding on the parties to that suit, that the Respondent was not entitled to sue in his father's lifetime for a partition of the moveable property and consequently could not assert his rights in that property until his father's death. It would be in the highest degree unjust to allow the Appellant, who has had for years the benefit of that judgment, to insist that it did not suspend the running of the *Statute of Limitations* because it was erroneous in point of law, and the Respondent ought to have appealed from it. There seems to their Lordships to be no warrant in law for such a contention. For the above reasons they are of opinion that the plea of limitation cannot be maintained.

The only remaining question of which their Lordships have to dispose has been raised for the first time at the hearing of this appeal, and they have not the advantage of having the judgment of either Indian Court upon it. It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one third undivided share in the property to which the father was entitled in his lifetime. The argument is founded upon the comparatively modern decisions of the Courts of *Madras* and *Bombay* which have been recognised by this Committee as establishing that one of several coparceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers.

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Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration. The *Madras* High Court has gone further, and ruled that an alienation by gift or other voluntary conveyance *inter vivos* will also be valid against the non-assentient coparceners. And, assuming this latter proposition to be law, the learned counsel for the Appellant have insisted that it follows as a necessary consequence that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindu law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by will.

To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at *Bombay*. The decisions of the High Court of *Bombay*, notably those reported in the 10 *Bomb.* H. C. R. p. 139, and 11 *Bomb.* H. C. R. p. 76, have ruled that a coparcener cannot without the consent of his co-sharers either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favour of the testamentary power over the undivided share fails.

Again, the High Court of *Madras*, though admitting that a coparcener can effectually alienate his share by gift, has ruled that he cannot dispose of it by will (see the case reported 8 *Madras* H. C. R. p. 6). Its reasons for making this distinction between a gift and a devise are, that the coparcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheopershad Singh* (1), and was fully recognised by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the lifetime of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of

(1) Law Rep. 6 Ind. Ap. 88.

positive authority at *Madras*, as well as at *Bombay*, is against the proposition of the learned counsel for the Appellant.

Their Lordships are not disposed to extend the doctrine of the alienability by a coparcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsi Koer* above referred to they observed:—"There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law); and the law as established in *Madras* and *Bombay* has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the *Bombay* and the *Madras* High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the *Madras* Court has decided against the power of alienation by will are sound, and sufficient to support that decision. The Appellant has, therefore, failed also upon the question which he has raised as to the effect of the will.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The costs of the appeal must follow its result.

Their Lordships wish to throw out for the consideration of the parties how desirable it is for both of them to come, either in one or other of the ways indicated by the High Court or in some other manner, to an amicable settlement of their differences upon the basis of this decree. It is obvious that if they persist in fighting out the case to its bitter end, by taking the accounts directed by the High Court hostilely, they are likely seriously to impair, if not destroy, the ancestral business which is the chief subject of dispute.

Solicitors for the Appellant: *Ashurst, Morris, Crisp, & Co.*
Solicitors for the Respondent: *Ramsden & Austin.*

J. C.* 1880 June 10, 11, 22. SOPHIA ORDE AND JAMES SKINNER . . PLAINTIFFS;

AND

ALEXANDER SKINNER . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Act VIII. of 1859, *s.* 5.—*Jurisdiction—Residence—"Dwelt."*

The Defendant being one of the proprietors of the fort and residence at *B.*, in the district of *Meerut*, where an establishment of some kind was kept, occasionally resided there for periods of time more or less considerable. The will of the testator (his father), under which he derived title, contemplated that the said fort and residence might be the principal place of residence of the testator's family, in which his family memorials should be preserved. It appeared that the Defendant also had a private house at *M.*, in the district of *Saharanpur*, in which he was actually, though temporarily, residing at the time the suit was brought:—

Held, that the Defendant "dwelt" at *B.* within the meaning of sect. 5 of Act VIII. of 1859, and was therefore subject to the jurisdiction of the Court at *Meerut*.

APPEAL from a decree of the High Court (April 5, 1877) reversing a decree of the Subordinate Judge of *Meerut* (June 27, 1876) in favour of the Appellants.

The judgment of the High Court proceeded solely on the ground that the *Meerut* Court had no jurisdiction to entertain the suit against the Respondent, which was instituted on the 8th of August, 1874, to obtain from him an account of his management from 1863 to 1874 of the joint estate of the *Skinner* family, to which the parties belong, and payment to the Appellants of their one-fifth share of the rents and profits.

The facts are stated in the judgment of their Lordships.

The material passage in the judgment of the High Court (*Pearson* and *Turner*, JJ.) is as follows:—

"On appeal the plea of want of jurisdiction is again raised. In support of the jurisdiction of the Court of *Meerut* it has been argued that the cause of action arose in the district of *Bulandshahar*, which, as we have said, forms part of the Judgeship of

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Meerut, in that the Defendant was bound to render accounts at the chief seat of the family, *Bilaspur*, which is the fort and residence built on the altamgha grant; and, secondly, in that the Defendant must be held to have resided at the time suit was brought at *Bilaspur*, inasmuch as the family house is there maintained at the cost of the estate.

"We proceed to dispose of the latter of these arguments first. It is admitted that *Alexander Skinner* at the time suit was brought was actually residing at *Mussuri*, in the district of *Saharanpur*. He has there a private house in which he resides during the whole of the hot weather, and during the cold he travels through the estate, sometimes putting up at *Hansi*, sometimes at *Delhi*, and sometimes at *Bilaspur*, in one of the houses which have been maintained at the expense of the estate.

"Under these circumstances we hold he was not dwelling within the jurisdiction at the time the suit was instituted. In this country it frequently happens amongst Hindus that a family house is kept up at the expense of an undivided family, but it has never, so far as we are aware, been contended that each member of the family must be held to dwell in the family house because he may occasionally visit and has a right to reside in it, although he may have his permanent abode elsewhere, and be dwelling in his permanent abode at the time the suit was instituted.

"It will be convenient here to deal with another argument which might have been, but was not advanced in support of the jurisdiction of the Court of *Meerut*,—that the Defendant was at the commencement of the suit personally working for gain within the local area of that Court's jurisdiction.

"We hold that although the Defendant was entitled to a commission on the income of the altamgha estate, and although, as manager, it was no doubt, necessary for him occasionally to visit that estate, yet as he was not bound to reside on the estate, or to hold his office there, and did not in fact dwell there, nor, as we shall presently shew, have his office there, he was not personally working for gain in the district of *Bulandshahar* when the suit was instituted.

"It remains then only to deal with the argument that the cause of action arose in the district of *Bulandshahar*.

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"The will of Colonel *James Skinner* gives no directions as to the place at which the manager was to render accounts. In the will, immediately after the bequest of the income to his sons, he declares that, if they like to live together, they may live at *Bilaspur*, and build houses with mutual consent in the altamgha and zemindary, and, in another passage, he directed that his trophies and the presents he had received from his commanding officers should be retained by the manager of the estate at *Bilaspur*, but there is no direction that the head office of the estate, which during the testator's lifetime had been at *Hansi*, should be removed to *Bilaspur*. Nor do we find any sufficient evidence that at the time the suit was brought agreement or practice pointed to *Bilaspur* as the place at which the accounts were to be rendered.

"The Plaintiffs' pleader does not allege there was any agreement to that effect. He can refer only to the notification issued by the Defendant some months after the suit was brought, inviting the sharers to meet at *Bilaspur* and inspect the account. But against this piece of evidence we have the fact that the accounts had never previously been examined at *Bilaspur*, and that on the only other occasion on which they had been shewn, the examination was made by the Plaintiff, Mrs. *Orde*, in 1871 at *Delhi*.

"In the absence of any special direction by the testator, or any agreement or practice of the parties, the rule established in *Luckmee Chand* v. *Zorawur Mull* (1), which has been cited by the learned counsel for the Defendant, is, in our judgment, applicable. The place at which the general business of the family was transacted, and the general accounts kept, must be held to be the place where the contract is to be performed.

"We do not agree with the Subordinate Judge, Mr. *Smith*, that the office at *Hansi* was a mere place of deposit for old records. It appears from the evidence of *Sheikh Salimullah*, who was employed as a servant of the estate in 1859, that during the management of *James Skinner* the office at *Hansi* was regarded as the chief office of the estate, and that the papers were prepared there and sent to the manager for signature.

"It also appears from the evidence of this witness, and of the

(1) 8 Moore, Ind. Ap. Ca. 307.

witness *Cheda Lall*, that the office at *Hansi* has been continued as the chief office during the time; the estate was managed by *Hercules* and *Thomas Skinner*, and by the Defendant, up to the date on which the suit was instituted. The course of business, with regard to the accounts, appears to be as follows:—

"Daily accounts of receipts and disbursements are sent from each of the several estates to the manager.

"These accounts remain with the manager for three years, and are then sent to *Hansi*; but from them a monthly account is made up and sent to *Hansi*. Annual or six-monthly accounts are sent from each of the several estates to the manager, and to the office at *Hansi*. From what we may term the travelling office, which accompanies the manager, an abstract is prepared and sent with an account of his share to each sharer.

"The moneys are deposited with a banker at *Delhi* and all the sharers (except *Thomas Skinner*, who lived at *Bilaspur*, and to avoid the banker's charge for remittance drew his share directly from the income of the *Bilaspur* estate) were paid by drafts on the banker at *Delhi*, which drafts, the Defendant's counsel asserts, were drawn at *Hansi*. However this may be, it is proved that in 1860 notice was given to the revenue officer that the head office of the estate was at *Hansi*, and that income tax would be paid there.

"In a letter written, it is said, from *Delhi* by the Plaintiff *James Skinner* to the Defendant, dated the 19th of December, 1871, the Plaintiff appears to request that the papers might be sent to him from *Hansi* as the usual place of deposit; and in a letter, dated the 8th of December, 1871, by both the Plaintiffs to the Defendant they request him to cause their names to be entered as co-heirs of *James Skinner*, deceased, in the "office" of the *Skinner* estate. We conclude then that the sharers recognised a particular office for the general business of the family, and that office was the office at *Hansi*.

"Under these circumstances, applying the rule to which we have alluded, we hold that the cause of action arose at the office in the district of *Hansi*, in the *Delhi* division.

Leith, Q.C., and *Doyne*, for the Appellants, contended that the

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Respondent was subject to the jurisdiction of the Court at *Meerut*. He dwelt at the commencement of the suit at *Bilaspur*, within the local limits of the jurisdiction of that Court. The cause of action arose within those limits. The Respondent, by bringing the accounts of the estate at *Bilaspur*, and from thence into the Court at *Meerut*, brought himself and the cause of action within the jurisdiction of that Court. Upon the evidence it was not established that there was a head office at *Hansi*. The liability of the manager of the joint property was not, either by agreement or usage, confined to an account taken and payment made at *Hansi*. Nor was the right of the Respondent limited to that of requiring such account and payment to be made at that office and no other. Reference was made to Reg. II., of 1803, jurisdiction clause; *Khamah Dossee* v. *Sibpershaud Bose* and others (1); *Barlow* v. *Orde* (2); *Luckmee Chund* v. *Zorawur Mall* (3).

Cowie, Q.C., and *Graham*, contended that the Respondent could not be held to have been on the 8th of August, 1874, dwelling within the jurisdiction of the Court at *Meerut*. Reference was made to sect. 33 of Act VIII. of 1859, repealed by sect. 1 of Act XXIII. of 1861, and to *M'Dougall* v. *Paterson* (4). The cause of action arose at *Hansi*, where it was contended on the evidence the chief office of the estate was situated, and the general business of the family was transacted, and the general accounts were kept.

The Appellants' counsel were not called on for reply.

1880 *June* 22.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This appeal is one of several which have come before this Board in suits concerning the estate of the well-known Colonel *James Skinner*, the construction of his will, and the somewhat peculiar relations of his descendants *inter se*. Colonel *Skinner* died in 1841, leaving five sons, besides other children. His public

(1) Morton's Dec. 181.
(2) 13 Moore's Ind. Ap. Ca. 277.
(3) 8 Moore's Ind. Ap. Ca. 291.
(4) 11 C. B. 755; 21 L. J. (N.S.) (C.B.) 27.

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services had been rewarded by a large altamgha grant of land in the district of *Bulandshahar*, which lies within the local jurisdiction of the Judge at *Meerut*, in the North-Western Provinces; and he had also considerable landed and other property at *Delhi* and other places which are now, for all civil purposes, annexed to the *Punjab*, and notably an estate called *Haryana*, in the district of *Hissar*, of which the chief or sudr station is *Hansi*. Upon the lands constituting the altamgha he built a fort, and that estate seems to have thereafter acquired, if it did not before possess, the name of *Bilaspur*. At the time of his death he was resident at *Hansi*, where the corps of cavalry which he commanded was stationed.

His will bears date the 10th of May, 1841. The material passages of it are the following:—"I leave and bequeath the income of my altamgha, zemindary, and thika villages, gardens, and houses to my five sons herein named, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed property of the altamgha or zemindary. One of my sons, whichever is most fit or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get 10 per cent. from the whole income; and he is bound to shew a faithful account current yearly to his brothers. Should they like to live together they may live at *Bilaspur*, and build houses with mutual consent in the altamgha or zemindary. Should my personal property not pay off all my debts, they may sell my house at *Delhi* and my garden at *Trevillian Gunj*; but should the personal property pay the debt, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five sons."

Then follows a clause providing for the event of any of the sons dying under age and without issue, and the next material clause is: "I will and declare that it is my intention and meaning that, in the event of all or any of my afore-mentioned sons, *Joseph*, *James*, *Hercules*, *Alexander*, and *Thomas Skinner*, dying and leaving issue or children, the shares of the fathers shall devolve on the issue or children, to be by them divided in equal shares." And in a subsequent part of the will is this clause: "All my trophies and presents given by my commanders to be retained by the

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manager of the estate at *Bilaspur*, as remembrance of me to the survivors of the family."

The Appellants, the Plaintiffs in the suit, are children of *James*, one of the sons who are now deceased; and whatever doubts may at one time have been raised as to their title, it has now been conclusively determined, by the decision of this Board in *Barlow* v. *Orde* (1), that they are entitled in equal moieties to the share and interest of their father under their grandfather's will. The Respondent, *Alexander*, is one of the surviving sons of the testator, and the present manager of the estate under the terms of the will. There can, therefore, be no doubt that in a suit instituted in the proper *forum* he is accountable to the Plaintiffs for their father's one-fifth share in the net income of the whole estate.

The suit, which may be taken to be one to enforce this accountability, was instituted in the Court of the Subordinate Judge of *Meerut* on the 8th of August, 1874. It claimed an account from February, 1863 to 1874, the whole period of the Defendant's management.

The Defendant, by the written statement first filed by him, objected that the Plaintiffs had not observed the provisions of sects. 12 and 13 of Act VIII. of 1859, which relate to suits for land lying within different jurisdictions, and also that the suit was triable only by a Revenue Court,—objections now admitted to be futile; and on the merits, not disputing his general liability to account, he insisted that the accounts had been settled up to the year 1280 Fusli (1872–3), and that the subsequent accounts were then lying for inspection by the sharers in the estate, in the manager's office, which would remain at *Bilaspur* from the 2nd of January to the 2nd of February, 1875.

After the issues had been settled a further objection to the jurisdiction of the Court was taken. In what precise form it was originally taken does not appear, except by the statement of the then Subordinate Judge in his proceeding. That statement is as follows: "Among those pleas there was one to the effect that, as the head office of the estate was at *Hissar*, in the *Punjab*, the suit for the rendition of accounts could not be laid in the *Meerut* Civil Court. On the date fixed, the evidence offered by the parties on

(1) 13 Moore's Ind. Ap. Ca. 277.

that point was received, and after a consideration of the evidence so tendered and received, my predecessor, Mr. *Smith*, came to the finding that, to quote his words, 'the *Hansi* office is apparently a mere depôt for the custody of the old accounts and papers relating to the estate. The managers appear to be peripatetics, carrying with them their office, and transacting the business of the estate from wherever they happen to be. A manager may choose to store his books wherever he pleases; but the founder of the family specified *Bilaspur* as the family home, and where all insignia of the family are still kept, and consequently a suit for settlement of any account relating to the general estate must fall within the jurisdiction of the *Meerut* Court, under which *Bilaspur* is included.' The above decision was come to on the 20th of April, 1875; and after the determination of that and other preliminary points, the accounts of the estate were examined by a Commissioner appointed for the purpose, and, when after the lapse of several months, and at heavy cost to the Plaintiffs, the examination of the accounts was nearly over, a petition was filed on the part of the Defendant, tendering in evidence a copy of a vernacular proceeding dated the 13th of October, 1860, and a parwanah in original from the Deputy Commissioner of *Hissar*, addressed to *Kyali Ram*, agent of the *Skinner* estate, stationed at *Hansi*, dated the 16th of October, 1860, and referring to a book in which copies of parwanahs addressed to *Khyali Ram* were kept, and which had been produced in a suit between the parties, or at least some of them, and contending that, as those documents would shew that the head office was at *Hansi*, the suit for rendition of accounts could not lie in the Civil Court of *Meerut*."

The petition here referred to is in the record, and the effect of the final judgment of the then Subordinate Judge upon it, on the 27th of March, 1876, was to affirm the decision of his predecessor, Mr. *Smith*, upon this objection to the jurisdiction. The suit accordingly proceeded before him, the accounts taken being, apparently, by force of the *Statute of Limitations*, limited to the six years immediately preceding the institution of the suit; and on the 27th of June, 1876, the Subordinate Judge gave his judgment upon the merits. From this it appears that on the face of the accounts rendered there was due to the Plaintiffs, deducting

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the payments made on account to them, an admitted balance of Rs.7462 2*a*. 4*p*.; that the Plaintiffs, having been allowed to surcharge and falsify the accounts, had succeeded in raising that balance to the principal sum of Rs.61,427. 11*a*. 10*p*., for which, with the further sums allowed for interest and costs, amounting in all to Rs.94,957. 15*a*. 10*p*., a decree was passed against the Defendant. From this decree he appealed to the High Court of the North-West Provinces. The first of his grounds of appeal was that, with reference to sect. 5 of Act VIII. of 1859, the Lower Court was wrong in holding that it had jurisdiction to hear the cause. There were eleven other grounds of appeal, some of which it will be necessary to notice hereafter; but the appeal was heard by the High Court upon the first alone, when, holding that the Lower Court had no jurisdiction to entertain the suit, it reversed the decree and dismissed the suit.

The sole question argued in the first instance before their Lordships was that of jurisdiction; they have already intimated that their opinion upon it is adverse to that of the High Court, and their reasons for that conclusion will now be stated.

It is conceded on both sides that the question turns on the construction to be put upon the 5th section of Act VIII. of 1859; and that it lay on the Plaintiff to shew that either the cause of action arose, or the Defendant at the time of the commencement of the suit was dwelling, within the limits of the jurisdiction of the *Meerut* Court, within the meaning of that enactment.

Their Lordships will first consider whether the Defendant was subject to the jurisdiction of the Court by reason of his dwelling within its local limits. Some evidence was given on this point, and the conclusion of the High Court upon it is thus expressed: "It is admitted that *Alexander Skinner*, at the time the suit was brought, was actually residing at *Mussuri*, in the district of *Saharanpur*. He has there a private house, in which he resides during the whole of the hot weather, and during the cold he travels through the estate, sometimes putting up at *Hansi*, sometimes at *Delhi*, and sometimes at *Bilaspur*, in one of the houses which have been maintained at the expense of the estate." One of the witnesses, indeed, went so far as to affirm that the Defendant's sole permanent residence on the plains was at *Hansi*; but the

High Court has not acted on that evidence, which their Lordships think is untrustworthy. It is not contended that the proper *forum* for the trial of this suit for account was at *Saharanpur*, by reason of the Defendant's residence, at the time of its commencement, at the hill station of *Mussuri*. Such residence was obviously more or less of a temporary character, like that of a man in this country who lives in a house of his own at a watering-place during a portion of the year. And if the Defendant can be said to have had any permanent dwelling-place on the plains and within the ambit of the *Skinner* estate, he would not the less dwell there, according to the proper and legal construction of the word, because for health or pleasure he was passing the hot season on the hills when the plaint was filed. The question then is, did he not "dwell" at *Bilaspur* within the meaning of the section?

He was not a mere manager, though in this suit he is accountable in that character. He was one of the five original sharers in the estate, and as such he was one of the proprietors of the fort and residence at *Bilaspur*. Their Lordships cannot doubt on the evidence that there was a place of residence there, and are of opinion that the clauses in the will which have been cited shew that the testator and founder of the family contemplated that it might be the principal place of residence of his family. He undoubtedly treated it as the place in which the honourable memorials of himself and his services were to be permanently preserved. Again, their Lordships think it is sufficiently shewn upon the evidence that an establishment of some kind was kept there, and that the Defendant himself, though travelling for the most part during the cold weather about the estate, occasionally resided there, as he had an unquestionable right to do, for periods of time more or less considerable. In his own notice of the 13th of October, 1874, he called upon the other sharers to come and examine the accounts in the manager's office, which "would remain at *Bilaspur* from 2nd January to 2nd February." A man, however, may have more than one dwelling-place; and it is unnecessary to consider whether the Defendant may not have also such a dwelling-place at *Hansi* as would subject him to the jurisdiction of the Courts of the *Punjab*. It is sufficient to decide, as their Lordships do decide, that the Defendant so dwelt at *Bilaspur* as

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to make himself subject to the jurisdiction of the *Meerut* Court in this suit.

This being so, it is unnecessary to consider whether he is also subject to the jurisdiction of that Court by reason of the cause of action having arisen within the local limits of that jurisdiction, a question which upon this record presents some difficulty.

Their Lordships, however, deem it right to say that they cannot agree with the High Court in its conclusion that the sharers had recognised a particular office for the general business, that office being the one at *Hansi*; and that accordingly the cause of action must be taken to have arisen in the district of *Hansi*, and in the division of *Delhi*. They think that, on the contrary, no particular place for rendering the accounts has been fixed either by contract or practice, and that the evidence, confirmed by the Defendant's own written statement, shews that they were rendered and examined at different times in different places, including *Delhi* and *Bilaspur*, *Hansi* being shewn to be, as Mr. *Smith* found, only the repository of the older and settled accounts.

It follows from their Lordships' decision on this question of jurisdiction, that the decree of the High Court cannot stand. It seemed, however, to them that the Defendant was entitled to have the other objections to the decree of the lower Court which had been taken by his grounds of appeal, argued and determined; and that it would be most convenient to have them, if possible, determined here. Counsel have accordingly been heard upon such of them as have not been abandoned; and their Lordships have now to decide whether, in respect of any of them, there is any sound reason for reversing or varying the decree of the Lower Court.

These objections are comprised in the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh of the grounds of appeal.

The fifth, which is the first of those which have been argued, is perhaps the most important. It is, in terms, that the Lower Court is wrong in holding that the Defendant is not entitled to charge commission upon the gross income of the estate.

The question between the parties was, whether the 10 per cent. commission to which the Defendant was unquestionably entitled was to be calculated upon the gross collections, or upon some larger collections, or, as the Judge has found, and as the Plaintiffs

contend, upon the net income of the estate, being the fund which, subject to that commission, was divisible amongst the co-sharers.

The judgment of the Subordinate Judge (which their Lordships have no hesitation in saying is an extremely careful and well-considered one) has decided that point in favour of the Plaintiffs. He has considered the question with reference both to the construction of the will and to the practice which has prevailed, with more or less variation, during the time of the present and the former managers.

Their Lordships think that, if the question is clear one way or the other upon the construction of the will, that construction should prevail, whatever variations there may have been in practice; and they are of opinion that the construction for which the Plaintiffs contend is the true one. The clause which has already been read deals with the income of the altamgha zemindary and the rest of the estate as one fund. The testator gives that income to his five sons, there named, to share alike. It is obvious, therefore, that the word "income," as used in that passage, means the divisible fund. It was a fund to arise from the net returns from the different estates, on some of which were indigo factories, which were in the nature of trading concerns. An increased profit on one estate might be met by a loss on another; but the profits and losses were all to enter into one account, the balance of which was to constitute the divisible income or fund.

Then that portion of the clause which relates to the manager is as follows:—"One of my sons, whichever is most fitted or whoever I may name hereafter, is to manage the whole concern,"—that is, the whole of the estates,—whatever was to contribute to the divisible fund,—"for which trouble he is to get 10 per cent. from the whole income, and he is bound to shew a faithful account current yearly to his brothers." Their Lordships think there are no grounds for construing the word "income" in this passage in a sense different from that in which it is used in the other; and that there is nothing to support the contention that the manager was entitled to charge commission upon each sum which came to his hands from each separate estate or source of income; still less to charge it upon the nominal rents payable by the tenants or culti-

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vators, irrespective of the costs of collection. They are of opinion that the only way to make the whole will consistent is to hold that the commission was to be calculated upon the net fund divisible among the five sharers. Therefore, upon this item their Lordships agree entirely with the finding of the Subordinate Judge.

The sixth ground of appeal related to the disallowance of certain sums amounting in all to Rs.24,147,53, being expenses incurred by the manager which the Judge held he was not entitled to charge against the Plaintiffs, as representatives of one of the co-sharers. The defence of the items impeached which was set up by the Defendant was that the expenses in question, or the major part of them, consisted of the cost of the establishment kept up for the purposes of the estate, the user of which was incident to his office of manager. But the learned Judge has found upon the evidence that the Defendant entirely failed to make out that defence, as a matter of fact; and that the greater part of those expenses would never have been incurred but for his choosing, for his own convenience and enjoyment, to reside during the greater portion of the year at the hill station of *Mussuri*.

Their Lordships, therefore, think there is no ground for interfering with the learned Judge's disallowance of these items.

The seventh and eighth grounds of appeal relate to the house at *Delhi*. The first of them objects to the disallowance of a large sum of money as expenses improperly incurred, so far as the estate was concerned, in repairing, altering, and furnishing that house. The house was the well-known house of the testator at *Delhi*. In his will he directs that, if it should be necessary for the purposes of paying his debts, the house should be sold; but if it were not sold, it should be let on account of the estate. Upon the evidence it would seem that up to the time of the mutiny the house was neither sold nor let, but, by the common consent of the co-sharers, was kept up more or less for their common benefit as a mansion at *Delhi*. After the mutiny, during which it had been looted and greatly injured, the estate received from the Government, by way of compensation in respect of it, a sum of Rs.18,000. That sum they seem to have agreed, not to lay out upon the house, but to divide as part of the profits of the estate. The

house, however, must have been put into some sort of tenantable repair, since it was let first as a mess-house, and afterwards as a hotel for several years. The Defendant then saw fit to put an end to the lease of the keepers of the hotel, and to lay out a very considerable sum of money upon the house in repairs, alterations, and furnishing; and from that time he appears to have occupied it, whenever he was at *Delhi*, more as his own residence than as anything common to the family at large. At all events, no authority whatever has been shewn for the very considerable expenditure incurred upon it, as before mentioned. In these circumstances the Judge below has allowed all that was expended upon necessary repairs, and has disallowed the considerable sums spent in excess of that, treating them as having been laid out by the Defendant on his own account. He has also disallowed whatever expenses of the establishment are attributable to the private purposes of the Defendant as contrasted with the establishment which would necessarily be kept up in the house to protect and preserve it whilst unlet. In that allowance, and that disallowance, their Lordships think he was right.

But then the question is raised by the eighth ground of appeal whether he is right in charging the Defendant with an occupation rent of the house, as if it had been let to him. Their Lordships think that this is consistent with the will, which directs that the house, if not sold, should be let, as was done for a considerable period, and with the justice of the case.

There is nothing in the will which gives the manager the power of taking this house out of the general estate, in order to occupy it as his own exclusive residence.

They are therefore not disposed to allow this objection.

The objections raised by the ninth and tenth grounds of appeal have not been pressed.

The objection, however, to the amount decreed on account of interest, which is raised by the eleventh ground of appeal, has been strongly pressed. That interest should be allowed, to some amount, their Lordships have no doubt. The suit is for an account of what is due to the Plaintiffs in respect of their share. The Defendant has to account for all his receipts on account of the estate, and has a right to set up by way of discharge whatever he can properly claim under that head.

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It appears that when the suit was instituted a very large sum was due from him to the Plaintiffs, even upon his own mode of stating the accounts. After the suit was instituted he paid into Court a considerable sum, and reduced the admitted debt to Rs.7000 odd; but if he has during all this time kept the Plaintiff out of her share, he ought, upon every ground of justice and equity, to pay some interest upon it; and if the admitted debt would carry interest, so the sum of Rs.61,000, to which that debt has been swollen by the disallowance of items of discharge improperly claimed, ought also to carry interest.

Their Lordships can make no distinction between the claim for commission and the other sums which have been disallowed.

The Defendant was bound to know how his commission was to be calculated.

But then it is contended that the rate of interest allowed is excessive.

What the Judge has done has been to give 12 per cent. interest up to the date of the suit, to give 12 per cent. interest on the principal amount from the date of the institution of the suit up to the date of the decree, and to direct that the decree, when compounded of the principal, interest, and costs, should carry interest only at 6 per cent. It has been argued that the Court rate of interest is now 6 per cent.; and that the interest decreed should have been calculated throughout at that rate. The only rule or enactment regulating the conduct of the Judge in respect of the allowance of interest to which their Lordships have been referred is the 10th section of the Act of 1861, which says, "When the suit is for a sum of money due to the Plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of the suit; with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." Of course, the Court must exercise a judicial discretion in giving effect to this section, and would not be justified in granting an inordinate or unusual rate of interest.

Up to a certain time, however, 12 per cent. was notoriously the

rate of interest prevalent in the mofussil wherever interest was allowed by the Court, and it has not been shewn that there has been any enactment which absolutely controls the discretion given by this Act of 1861 to the Judge. A practice, indeed, of giving upon the aggregate sum decreed for principal, interest, and costs, interest only at 6 per cent., does seem to have grown up; but that may have been in order to prevent the parties from abstaining from enforcing their decree, and allowing their demand to roll on at 12 per cent. The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, express or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the mofussil, viz., 12 per cent. Hence their Lordships are of opinion that the Judge, in calculating the interest as he has done, has done nothing which he was not entitled to do.

It seems, therefore, to their Lordships that, the objections argued having all failed, they must humbly advise Her Majesty to reverse the decree of the High Court, and to confirm the decree of the Subordinate Judge, with the costs incurred in the High Court; and that the Plaintiffs are also entitled to the costs of this appeal.

Solicitor for the Appellants: *T. L. Wilson.*

Solicitors for the Respondent: *Barrow & Rogers.*

J. C.* 1880 April 27, 29, 30; June 24.

LULLOOBHOY BAPPOOBHOY, CASSIDASS MOOLCHUND AND OTHERS . . . . } PLAINTIFFS;

AND

CASSIBAI AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Hindu Law of Western India—Heritable Right of Widows of Collateral Relations of the Deceased.

The Hindu law of inheritance, as it has actually prevailed in *Western India*, recognises and affirms the right of a widow to inherit as a gotraja-sapinda to members of her husband's family; and there is no sufficient reason for holding that the doctrine to that effect which has so prevailed should not have the force of law. By that law the preferential right to inherit in the classes of sapindas is to be determined by family relationship, or the community of corporal particles, and not alone by the capacity of performing funeral rites:—

Held, in this case, that by that law the widow of a paternal first cousin of the deceased became by her marriage a gotraja-sapinda of the deceased, and is entitled to succeed to the estate in preference to male gotraja-sapindas who are seventh in descent from the common ancestor of them and the deceased, which common ancestor is sixth in ascent from the deceased.

APPEAL from a judgment of the High Court (April 29, 1876) affirming a decree of the Division Court (April 20, 1872), except as to costs. The case in the High Court is reported in the 2nd volume of Indian Law Reports (*Bombay* Series), p. 388.

The suit was brought by the first and second Plaintiffs to establish their right as heirs, according to Hindu law, to the estates left by *Mooljee Nundlall*, a Hindu inhabitant of *Bombay* deceased. The second Appellant represented the second Plaintiff. The remaining Appellants (the third and fourth) claimed as assignees of the other two.

Mancooverbai, after her death represented by *Cassibai*, was the first Defendant. She was the widow of *Gungadass*, who was *Mooljee's* paternal first cousin, and at his death his nearest male relative. She denied the title of the Plaintiffs, and contended

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

that she was a nearer heir than the first and second Plaintiffs, according to the Hindu law of *Western India*. The Judge of the first Court held that she was such nearer heir, and dismissed the suit with costs. On remand under an order of the High Court, made in an appeal, the same Judge arrived at a contrary conclusion, and decided the issue as to heirship in favour of the above two first-named Appellants. This finding was reversed by the High Court on appeal, and the original decree was affirmed, except as to costs, which were directed to be paid out of the estate.

The judgments of the High Court, on which the decree under appeal was founded, held (1) that a female may be gotraja-sapinda for the purposes of inheritance, in accordance with the doctrine of the Achara Kanda chapter in the Mitakshara, and of the Sanskara Mayukka; (2) that *Mancooverbai*, as widow of *Gungadass* the first cousin of the deceased *Mooljee Nundlall*, is, in conformity with that view, to be deemed a gotraja-sapinda of *Mooljee*, and nearer as such in position to him than the Plaintiffs *Lulloobhoy* and his brother *Mulchand*.

The judgment of *West*, J., stated the grounds upon which the second finding of law above stated was arrived at, and is as follows:—

"Of the Plaintiffs in the present case *Lulloobhoy* is the seventh and *Cassidass* the eighth in descent, according to the inclusive mode of reckoning followed by the Hindus, from *Motilall* the sixth in ascent by the same method from the deceased *Mooljee*, whose former property is the subject of dispute. According to the law prevailing in *Bengal*, neither of the Plaintiffs would rank as a sapinda of the deceased. When the common ancestor (within three degrees) is reached, the collateral descent constituting sapindaship stops with his great-grandson; or, if the connection be through his daughter, with the grandson. (Dayabhaga, xi. sec. vi., para. 6, 7, ss.; Dayakrama Sangraha, ch. i., s. x.) The maternal relations within the same degrees take the next place, and those must be exhausted before the next class, called the sakulyas, come in. These are three descendants below the great-grandson and three ascendants above the great-grandfather, with the collateral descendants from each down to the great-grandson,

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or the grandson through a daughter: as in the case of the sapindas (*Coleb.* Dig., bk. v., tit. 434 to 435, Comm: Vyavastha Darpana, 303 s.).

"According to this system *Lulloobhoy*, the Plaintiff in the present case, would be excluded from the inheritance by the nearer collateral relatives of *Mooljee*, if any, through his mother as well as through his father. As a descendant from a sakulya, but beyond the third in descent, he could rank only as a samanodaka under the rule indicated in *Coleb.* Dig., bk. v., tit. 436, which does not indeed expressly provide for his case, but by extending the line of heirs springing from the eighth ascendant down to the fourteenth in descent, gives inferentially the like right to descendants beyond the third from the nearer ascendants in the line above the *propositus*.

"According to the Smriti Chandrika, which may apparently be regarded as the governing authority in *Madras*, and the Vyavahara Madava, which also is of weight in that presidency, the maternal relatives do not come in immediately after the nearer sapindas *ex parte paternâ* as in *Bengal*. The ascending line of sapindas continues for six degrees, and then follow six samanodakas; but only the son and grandson, no daughter or daughter's son of an ascendant are recognised in each instance as coming next after their progenitor. Failing them the succession goes one degree higher, and when the class of samanodakas thus constituted has been exhausted, the bandhus are brought in, connections within five degrees, one of which is through a female (1 W. & B., 177, *Gridhari* v. *Government of Bengal* (1)). According to this system *Lulloobhoy's* right could not arise, at any rate, while there remained a son of the paternal aunt or of the maternal uncle or aunt of the deceased *Mooljee*, or any one standing within the same degree of relationship to *Mooljee's* father or his mother.

"By the Mitakshara doctrine as given at 1 W. & B. 143, those who are within six degrees of a common ancestor in the male line are sapindas of each other. In his actual enumeration indeed of those taking as gotraja-sapindas, *Vijnyanesvara* stops at the third in descent in the collateral lines (Mit. c. 2, s. 5, c. 4, s. 5); and on this *Colebrooke* grounded a remark that the Mitakshara line of

(1) 12 Moore's Ind. Ap. Ca. 448.

succession was confirmed by the Vyavahara Madhava and the Smriti Chandrika, but on account of the extension of the sapinda relationship authorized by *Vijnyanesvara's* comment on *Yajnavalkya*, I. 52, 53 (1 W. & B. 143), and sanctioned by the Privy Council (see 1 W. & B. 139, and *Bhya Ram Singh* v. *Bhya Ujar Singh* (1)), the two orders of succession coincide only to a limited extent. By the Mitakshara the heritable descent may be traced to the sixth below the point of divergence of the two lines; *Lulloobhoy* is therefore, through their common ancestor *Motilall*, a sapinda of the deceased *Mooljee*. He is not to be excluded from inheritance to *Mooljee* either by sapindas *ex parte maternâ* as in *Bengal*, or by the bandhus as in *Madras*. The sole question is whether his right is preferable to that of *Mancooverbai*, the widow of *Mooljee's* first cousin. * * * *

"The succession of the male gotraja-sapindas themselves not provided for in detail by the law books, has, as we have seen, given rise to some controversy. The same texts have been construed by the different schools as pointing to lines which are then to be pursued to a greater or less distance according to the governing principles of interpretation which each school has adopted. As to the right of widows to take the places of their deceased husbands, the meagre indications of the texts have left still more room for dispute, and it has thus been possible for the learned counsel on each side in the present case to lay before us arguments of considerable weight both for the admission and for the rejection of this principle as part of the Hindu law.

"The incapacity of women in ordinary cases for inheritance as pointed out in the *Utpat* case (2) was probably at one time a generally received doctrine. It forms the basis of the *Bengal* and *Madras* laws still (see the Smriti Chandrika, ch. iv., para. 5; Dayabhaga, ch. xi., sec. 6, para. 11), but it is discarded by the Mitakshara (see Mit., ch. ii., s. 1, pl. 22, 24, 25), which, agreeably to the principles laid down by it in discussing the rights of a widow, includes the grandmother and great-grandmother amongst the gotraja-sapindas. By the other method of interpretation illustrated in the Smriti Chandrika (Engl. Transl., p. 192), gotraja being regarded as essentially masculine in sense, is held to exclude

(1) 13 Moore's Ind. Ap. Ca. at p. 373. (2) 11 Bomb. H. C. R. 249.

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females, though room is made for those who are provided for by special texts. The mere recognition by *Vijnanesvara* of the mother and paternal grandmother as heirs might be accounted for by the same texts, but the class in which he places the grandmother and his inclusion in the same class of the paternal great-grandmother (unentitled except as a mere gotraja-sapiṇda), shew that he accepted women's heritable capacity as a general principle enabling him to extend the text of *Yajnyavalkya* to females not expressly mentioned as heirs in any of the extant Smritis.

"It is said that the reason which *Vijnanesvara* gives for the precedence which he assigns to the mother over the father, as heir to a son, rests on a ground which, though in part applicable to the grandmother and other female ancestors of the *propositus* in the paternal line, affords no support whatever to the claims of widows of collaterals. The reason assigned for the preference given to the mother (Mit. ch. ii., s. iii.) seems a very artificial one. *Nilkantha* in the Mayukha (ch. iv., s. viii., pl. 15) declines to recognise it. *Jagannatha* (*Coleb.* Dig., bk. v., tit. 424, Comm.) seems to prefer the father, though not decisively. *Vachaspati Misra* pronounces for the mother's precedence on the authority of *Vishnu* and *Brihaspati* (see Vivada Chintamani, p. 293, English translation), though as to the former he seems to be mistaken (see 1 W. & B., 341), and *Brihaspati's* rules do not appear to be quite self-consistent (see *Coleb.* Dig., bk. v., texts 422, 423). He cites texts of *Menu* also, which might well be construed adversely to this doctrine of the *Mithila* school. The question might probably be resolved with equal plausibility in either way. But whether *Vijnanesvara's* reasons for preferring the mother to the father are good or bad, he does not assign them in favour of the grandmother or great-grandmother. The grandmother he (1) brings in on the strength of a text of *Menu* (2), which, as he has to depart from its literal sense, would have enabled him, so far as one can see, to place her as well after as before the grandfather (3); yet in the precedence which he assigns to her he has been followed by the Mayukha (ch. iv., s. 8, pl. 18). He has probably deter-

(1) Mit. ch. ii. s. i. pl. 7, s. v. pl. 2. Catyayana, quoted in Coleb. Dig. bk. v., ch. viii. s. 425.

(2) Menu, ch. ix. pl. 217. See also

(3) Mit. ch. ii. s. v. pl. 1, 2, 3.

mined her place and that of the great-grandmother relatively to their husbands by analogy to the place of the mother relatively to that of the father (as in the Dayabhaga, ch. xi., sec. v., para. 4), and that he did not intend in other respects to give to these ancestors any right except that of gotraja-sapindas is clear from the way in which he sets aside the literal sense of *Menu's* text, assigning to the grandmother the next place after the mother. This would have enabled him to bring her in as he has brought in the daughter's son (ch. ii., s. ii., para. 6) apart from her position as a gotraja, so that it is clear he thought she was properly included in the class, and afforded an analogy for dealing with the cases of other wives of gotrajas, at least in the ascending line.

"The difficulty arises in the transition from the wives of male gotrajas in the ascending line who take precedence of them, to wives of gotrajas in the collateral lines who are postponed to their husbands. *Vijnanesvara*, after providing for the great grandmother, great-grandfather, and their sons and issue, concludes:—'In such a way do samanagotra-sapindas to the seventh degree take the property' (1). He no doubt intends to lay down a general rule, but what the precise scope of the rule is, it is not possible to say with certainty, and that the whole subject has been a puzzling one to the native law writers is evident from *Colebrooke's* note (2). We may observe that by using the word 'samanagotra,' in indicating the continuation of the line of succession, *Vijnanesvara* would most certainly indicate 'persons connected by gotra.' In pl. 3 he says:—'gotraja-sapindas, *i.e.*, the grandfather and the like, take the estate; the binnagotra-sapindas (*i.e.*, of a different gotra or family) are included in the term bandhus.' There cannot be much doubt therefore that he may have intended to rank as gotra-sapindas not only persons born in the family, but all included in the family. A woman on marrying quits her own gotra for that of her husband (*Steele*, p. 27, note, 1 W. & B. 233, Q. 3, p. 231, note), and she would thus in her husband's family fall within the class of gotrajas as understood by *Vijnanesvara*. Still, though the term as he understood it would include a widow, it is possible that he may have had only the male gotrajas in view;

(1) Mit. ch. ii. s. v. pl. 5, 6. (2) Mit. ch. ii. s. 5, pl. 5, 6, note 5.

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his omission to provide expressly for the widows of any collaterals is an argument that he did not intend to include them, and he could not have been unaware that their rights were not universally admitted. On the other hand, it must be remembered that the commentators wrote almost exclusively for their own schools. *Vijnanesvara's* rules for the inheritance of the widow and to her property, shew that he identified the wife with her husband and his family more closely than the doctors of other schools. He really accepted the proposition that 'of him whose wife subsists, one half the body survives': (*Vrihaspati*, in *Coleb.* Dig., bk. v., c. 8, text 399; and see *Menu*, ix., 15), as a basis for actual practice. The school of the Vajasaneyins, or followers of the White Yajurveda, may be regarded as specially favourable to women. The famous dialogue ascribed to *Yajnavalka* with *Maitreyi* (*Muller*, H. S. L., 22), points to a division by that sage of his property between his two wives when he was himself retiring from the world; and *Katyayana's* Srauta Sutra, the only one on the White Yajurveda, allows to women, though not to cripples, the right of sacrifice as authorized by the Vedas: (See *M. Muller*, H. S. L., 199, 349). *Visvesvara*, the author of the Subodhini, the chief commentary on the Mitakshara, says that 'gotraja' may properly be taken to include both males and females (1 W. & B. p. 146); and *Balambhatta*, insisting on the same view, applies it to the determination of the right of a predeceased son's widow, whom he places next after the paternal grandmother. There is a pervading partiality towards female claims in *Balambhatta's* Commentary which has led to a strong suspicion that it was composed by a lady (1 W. & B., Introd. 5); but *Colebrooke*, in the preface to his translation of the Mitakshara, speaks of it in terms of commendation (*Stokes*, H. L. B. p. 177). The Viramitrodaya argues elaborately as it would seem for the right of uncle's widows to succeed, as the necessary result of a construction of *Yajnyavalkya's* text, according to the doctrines of *Vijnanesvara*, in opposition to the narrower rules of the Smriti Chandrika (ch. xi., sect. v.), and the Dayabhaga (ch. xi., sect. vi., para. 10); though for the author's own part he is disposed to accept the general rule of the exclusion of females as applicable to the gotrajas. In this he departs from the Mitakshara, as in the passage at 2 W. & B. 100,

where the Vedic text of disqualification is cited, and *Menu* misquoted in support of it.

"Upon the whole, it would appear more probable than not, upon the text of the Mitakshara, and its recognised exponents, that it did intend widows to be included amongst the gotrajas, and that the particular place which it assigns to the female gotrajas in the ascending line relatively to their husbands is not an argument of much weight against this, as it is probably due only to a rather fanciful analogy which did not influence the author in determining their right to admission. The point, however, is one that admits of infinite controversy so far as the text is concerned, one therefore in which actual practice is of the greatest weight in determining which of the conflicting explanations is to be preferred to the others, according to the principles laid down by the Privy Council in *Collector of Madura* v. *Mootoo Ramalinga Sattrapathy* (1).

"In the case at 1 W. & B. 163, the Shastri, recognising the sister-in-law of the *propositus* as a gotraja-sapinda, yet adds that she is 'not a sapinda in the fullest sense of the word,' and consequently postpones her to a first cousin. What he meant by 'the fullest sense of the word' sapinda it is not easy to say, and as he quoted no authorities that were applicable, no light can be gathered from that source. Probably he meant that though gootrajas-sapindas according to one system, that of the Mitakshara, they would not be so according to the other, by which the cousins as givers of oblations to the ancestors of the propositus would render a benefit that the sister-in-law could not confer. At page 171 however of the same work the sister-in-law is given precedence (Q. 3) over a distant cousin, and even (Q. 2) over a first cousin of the *propositus*.

"The answer to Q. 3, at p. 173, gives to the widow of the paternal uncle of the *propositus* precedence over the second cousin of his father, *i.e.*, the great-grandson of the great-great-grandfather of the *propositus*; and thus recognised as a gotraja-sapinda, she of course takes as stated at the same page (Q. 2) before the maternal uncle, *i.e.*, a bandhu of the *propositus*. The Veramitrodaya says that logical consistency would have bound *Jimûta Vahana* also to assign her a place next to her husband.

(1) 13 Moore's Ind. Ap. Ca. 435–438.

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"At page 174 it is laid down that the widow of a first cousin of the *propositus* is an heir, and even the widow of a second cousin.

"The Mitakshara directs that on the death of a widow, failing specified heirs, a successor is to be sought amongst the gotraja-sapindas of her deceased husband (Mit. ch. ii., s. xi., pl. 9, 11, 25, 1 W. & B. 212—*Vizíarangam* v. *Lakshman* (1)). The cases of inheritance to a widow thus serve to indicate in several instances who were regarded by the Shastris as the husband's nearest sapindas. At 1 W. & B. 231, the husband's sister-in-law is preferred as heir to his widow before his sister's son, on the express ground that the sister-in-law is a gotraja-sapinda, in virtue of which she ranks before the mere bandhu. The Shastri's note to his answer in this case has not been translated with sufficient explicitness. It explains that a woman by marriage is born into her husband's family, and thus ceases to be a gotraja, though she remains a sapinda of her own blood relations. At p. 219, there being two widows of half brothers, on the death of one of them the mother-in-law still surviving was preferred to the other half-brother's widow, but the Shastri does not exclude the latter from the line of inheritance. At p. 238 cousins six or seven removes distant are pronounced heirs of a cousin's widow as being the sagotro-sapindas.

"At 1 W. & B. 115 (Q. 3), the Shastri gives the daughter-in-law of the *propositus* precedence over the daughter's son. This is wrong, seeing that the daughter's son is expressly provided for by Mitak. ch. ii., s. iii., pl. 6; but it shews that the Shastri regarded the daughter-in-law's position in the line of heirs as unquestionable, and her place could only be that of a gotraja-sapinda. The Shastri, at p. 169, cites *Manu*, ix. 187, in support of her right. Similarly at p. 133 the Shastri does not exclude her, though he says she 'cannot be heir while there is a nephew alive,' as in 2 *Macn.* 75, a nephew being one of the series of heirs specially enumerated. *Colebrooke*, at 2 *Sto.* H. S. 234, shews that the Vaijayanti prefers the daughter-in-law to the daughter.

"The decided cases in the Superior Courts bearing on this question are but few in number, and the reports are generally uninforming. At 2 *Borr.* 557, a daughter-in-law is preferred to a daughter's son. The Broach Shastris would have postponed her,

(1) 8 Bomb. H. C. R. 261; 11 Moore's Ind. Ap. Ca. 175.

because she was childless, a bad reason for what was probably a correct opinion, the *Bengal* law (Dayab. ch. xi., sect. ii., pl. 3), not being in force in this Presidency. At 2 *Borr.* 670, the daughter-in-law is preferred even to a separated brother of the *propositus*, a decision which only serves to shew that she was regarded as a possible and near heir, though by people very inattentive to the law on which they delivered official opinions. A grandson's widow, preferred by the Sudder Court of *Bengal* to a son's daughter (7 B. S. D. A. 59), was by the Sudder Court of *Bombay* postponed to a daughter's son (Select Rep. 132, 1st ed.), but without any denial of her right of inheritance.

"In the *Agra* Sudder Reports for 1862, at p. 306, there is a case where, under the Mitakshara, the widow of a cousin was preferred to the male descendants of a long-severed branch. That case might be regarded as on all fours with the present one, but the Shastri has either given an irrelevant reason or else the case has been so ill-reported as to considerably impair its authority.

"Lastly, we have the case of *Lakshmibai* v. *Jairam Hari* (1), in which the widow of a collateral was preferred to a male collateral in a branch parting from the common stock at one step further from the *propositus*. If this case was not wrongly decided it must be taken as conclusive of the rights of widows of gotraja-sapindas to succeed next in order to their deceased husbands representing collateral lines, according to the law of the Mitakshara. Seeing how uniformly, as cases have arisen, the Hindu law officers have construed the Mitakshara as admitting the widows, it cannot, we think, be said that that case was wrongly decided. The recognition of the widows of gotraja-sapindas as themselves gotraja-sapindas, however slender the basis on which it originally rested so far as collaterals are concerned, has become a part of the customary law (2) wherever the doctrines of the Mitakshara prevail, and the Courts must give effect to it accordingly. Whether indeed the widow of a collateral should take before the son or grandson of the same man may admit of question. The mother of the *propositus* takes before her son or grandson, and a like precedence is

(1) 6 Bomb. L. R. A. C. J. 152.

(2) Menu, II. 12, viii. 46, Yajnavalkya, I. 7 Apastamba Samaya Charika Sutra ad init. *Bhau Nanaji* v. *Sundrabai*, 2 Bomb. H. C. R. at p. 266, ss.

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assigned to his grandmother and great-grandmother; but brother's wives, on the other hand, are not mentioned between brothers and their sons in *Yajnavalkya's* text, nor has *Vijnavesvara* found a special place for them, or for a descendant's widow, as he has for the daughter's son. Although, therefore, a woman become a member of her husband's family, takes the benefit of a rule resembling that of the Roman law, '*Juris consultus cognatorum gradus et adfinium nosse debet*,' D. Lib. 38, T. 10, sect. 10, yet as in that law the widow's right of inheritance was limited and of late introduction, the gradus applying in strictness only to blood relations, so analogy may be thought to lean somewhat to the preference of the eldest surviving male as representative of any branch to the widow of any collateral in the same line, but the point cannot be finally decided until it arises in the proper form. It is enough for the purposes of the present case to say that a widow in a nearer collateral line has precedence according to the Mitakshara over a male in a remoter line.

"The Mitakshara is the leading authority on the Hindu law of inheritance for this Presidency, but it is subject (*Viziarangam* v. *Lakshman* (1); *Krishnaji* v. *Pandurang* (2)) to an exception in the island of *Bombay*, where the doctrines of the Vyavahara Mayukha predominate. It must be seen, therefore, whether on the point we are considering the Vyavahara Mayukha makes a provision different from that of the Mitakshara.

"As regards the capacity of women to inherit, the two works agree. *Nilkantha* says that the paternal grandmother is the first amongst the gotraja-sapindas (3), and this is in accordance with his adoption in the Sanskara Mayukha (Ms. of 44) of *Vijnanesvara's* theory of the sapinda relationship as arising from blood or bodily connection, rather than from sharing in common oblations. He also admits the sister (4), and this again denotes his acceptance of woman's heritable capacity as a leading principle. But it also takes him aside altogether from *Vijnanesvara's* line of succession. According to the Mitakshara 'gotraja' is equivalent to 'samana-gotra' (*i.e.*, connected by gotra); and a sister who by marriage

(1) 8 Bomb. L. R. 244, O. C. J.
(2) 12 Bomb. L. R. 65.
(3) Vyav. Mayukha, ch. iv. s. viii. pl. 18.
(4) Vyav. Mayukha, ch. iv. s. viii. pl. 19.

had passed or was to pass of necessity into another gotra would be postponed to all within the gotra of the *propositus*. *Nilkantha* says 'gotraja' means 'born in the gotra,' and that after the specified heirs the sister takes as the nearest to the *propositus*. In this interpretation of 'gotraja' he agrees with *Devanda Bhatta*, the author of the Smriti Chandrika, but the latter limits the term, as we have seen, to males. Having thus admitted the father's daughter as a gotraja-sapinda it would have been a logical extension of *Nilkantha's* doctrine to admit the grandfather's daughter and the daughters of other ascendants next after males in the same degree. They are all born in the gotra, and therefore, according to his reasoning, gotraja-sapindas entitled to take according to their propinquity. Messrs. *West* and *Buhler* say (1): 'At all events he would place the daughters of male gotraja-sapindas amongst the heirs bearing this name.' Yet it does not on full consideration seem possible to maintain with confidence this induction from the single instance given by the author. On failure of the sister, *Nilkantha* says (2) the grandfather and half-brother are to inherit together; and then, without making any provision for the grandfather's daughter, he proceeds to the great-grandfather, the uncle, and the half-brother's sons. The introduction of the sister as a gotraja-sapinda is thus counterbalanced by the omission of the paternal aunt, and we are thrown back on the (3) preceding placitum for such guidance as it may afford in determining generally what females rank or not as gotraja-sapindas.

"*Nilkantha*, while he admits the paternal grandmother makes no provision for the paternal great-grandmother by his subsequent arrangements; if they are to be considered as in any way exhaustive, he rather implicitly excludes her. Yet being able to provide for the paternal grandmother apart from all gotraja connection by means of *Menu's* text in her favour, he has chosen to rank her amongst the gotraja-sapindas. She does not, like the great-grandmother in the Mitakshara, rest on this connection, and this alone, for her place in the line of inheritance, but being designated a gotraja-sapinda, and being so only in virtue of her marriage, it follows of necessity that *Nilkantha* thought that

(1) 1 W. & B. 118. (2) Vyav. Mayukha, ch. iv. s. viii. pl. 20.
(3) Vyav. Mayukha, ch. iv. s. viii. pl. 18.

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marriage as well as birth created the gotraja relationship. This might lead to absurd results, as women inheriting in two families, while men inherited only in one, might gradually absorb all the property; but, as we have seen, the blood gotraship of women cannot safely be extended beyond the sister. The admission of the paternal grandmother stands as the sole indication of the recognition of wives and widows in the family as gotrajas, and this itself is met by a disposition apparently excluding or suggesting the exclusion of all females more remote than the paternal grandmother (1).

"Thus, if the foundation of the rights of widows of gotrajas under the Mitakshara is slender, under the Mayukha it may be called almost shadowy. No widow of a collateral is expressly provided for; the only wife of an ascendant expressly admitted is one for whom there is a special text. It might be supposed that the native jurists would have found it impossible to admit the widows of collaterals to the rank, under such a law, which they have been assigned under the Mitakshara, yet they seem not to have thought the difficulty at all insuperable. It is to be observed that the rule for equal distribution of the property amongst remote relatives of the *propositus* (Vyav. Mayukha, ch. iv., s. viii., pl. 20) standing at an equal distance from him appears to have been wholly disregarded in practice. No instance of its application is to be found amongst the cases collected by Messrs. *West* and *Buhler*, nor has any claim by co-heirs, as far as our experience goes, ever been based upon it. *Nilkantha's* speculative suggestion in placitum 20 has not then, by its accordance with, or adoption into the customary law, become a binding rule. The Pundits, perhaps, like Mr. *Colebrooke* (Mitakshara, ch. ii., s. v., pl. 5, note), could not make out what it would lead to, and therefore, even while professing a general allegiance to the Vyavahara Mayukha, adhered to the older rule of the Mitakshara, except where this was qualified by so clear and specific a modification as that in favour of the sister.

"That the native authorities have considered the Mayukha to have adopted the Mitakshara doctrine with the exception we have indicated, or else themselves declined to follow the Mayukha any

(1) Vyav. Mayukha, ch. iv. s. viii. pl. 20.

further in its divergence from the older standard, is made clear by the cases to which we have referred. For most of the replies given by them the Shastris cite the Vyavahara Mayukha along with the Mitakshara, as at 1 W. & B. 238. If the Mitakshara is cited alone in support of a female gotraja's claim, as at 1 W. & B. 171, 174, the Mayukha alone is in other instances cited for the same purpose (1 W. & B., *ibid*, and pp. 115, 170, 171, 174). In the case at 2 *Borr.* 557, evidence was given of custom amongst the Oodich Brahmans having assigned precedence to the daughter-in-law over the daughter's son. In the case at p. 670 the daughter-in-law was assigned precedence over the surviving half-brother. The half-brother, according to the Mayukha, stands at a much greater distance from the *propositus* than the brother of the full blood, but still, being assigned a definite position side by side with the grandfather, he could not be postponed to the daughter-in-law, who is not expressly named, unless the daughter-in-law were deemed entitled to precedence as a gotraja according to her propinquity. The Mayukha is not expressly cited in this case, but the parties residing in *Guzerath*, it may be supposed to have governed the Shastri and the Court. It was either supposed to have recognised female gotraja-sapindas, made such by marriage, or else was not accepted as determining the law.

"It results from this investigation that although the Mayukha's acceptance of *Vijnanesvara's* doctrine is so slightly indicated, yet it is on the understanding of this acceptance that it has itself been accepted. Its provision in favour of the sister has been received into common law, but in other respects it has been reduced to harmony with the Mitakshara. It is quite conceivable that a different construction should have found recognition in the island of *Bombay*, that the provision for the sister should have been taken as an indication of the rule to be generally followed with respect to females born in the family, that females entering the family should not be recognised as thereby acquiring rights of inheritance, and that males equally remote by ascent or descent, or both, should take together. If such a construction had become a part of the living law of the place, we should be bound to give effect to it; but no evidence of a customary interpretation of the Mayukha different from what prevails elsewhere has been laid before us. It

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is not likely that any difference should exist, for the population that has poured into *Bombay* from the neighbouring country would naturally bring with it its own customary law and particular text books, with no other construction and no more binding authority than that customary law assigned to them. It is to be regretted that we should have to deal with important civil rights by reference to principles which almost elude our grasp when we endeavour to give them a practical application; but we must, in matters of inheritance, administer to the Hindu community such a law, however vague and nebulous, as it has been content to devise for itself or to accept from tradition. By that law the widow of the gotraja-sapinda of a nearer collateral line appears entitled to precedence over the male gotraja in a more remote line, and we must accordingly pronounce against the claim of the Plaintiffs."

Cowie, Q.C., and *Graham*, for the Appellants, contended that the next heirs of *Mooljée* according to the Hindu law prevalent in *Bombay* at the time of the death of his widow were *Lulloobhoy* the first Appellant, and *Moolchand*, the father of the second Appellant *Cassidas Moolchand*. It was urged that the widow could not take independently, and that there was nothing in the Mitakshara or Mayukha to shew that she could take at all except through her husband. The responses of the Pundits, as they are collected by *West* and *Buhler*, cannot be recognised as of any weight in construing the Mitakshara. In this case the widow, the Respondent, was not a sapinda of the deceased. For purposes of inheritance the term "sapinda" denotes connection by means of funeral oblations. The widow can only make oblation to her husband, not to his father or other relations. Women, in fact, do not offer obsequies except where specially authorized by the Shastras so to do.

Reference was made to *Menu*, c. ix. sl. 186, 187, and as to the meaning of *pinda* see Dattaka Mimansa, sect. 6, sl. 12, annotation 10, also sl. 32. For other authorities as to sapinda connection, see *Menu*, c. ix., sl. 142, and c. v., sl. 60; Dayabhaga, ch. xi., sect. 1; sl. 31–43: sect. 6, sl. 17, 21; Dayakrama Sangraha, c. 1, sect. 10, sl. 24, 25; sect. 3, sl. 4, and sects. 5 and 8; judgment of *Dwarkanath Mitter*, J., in *Amrita Kumari Debi* v. *Lakhinarayan*

Chuckerbutty (1); Mitakshara, c. 1, sect. 10, sl. 1; sect. xi., sl. 21, 22, 31; c. ii., sect. 1, sl. 18; sect. 2, sl. 6; sect. 3, sl. 2–5; Vyavahara Mayukha, c. iv., sect. 5, sl. 18, 21, *Stokes'* ed., p. 64. The definition of sapinda given in the Acharya Kanda applies only to marriage and the degree of affinity within which marriage is permissible. *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (2) shews that in regard to sapindaship for purposes of inheritance it is treated on the footing that oblations are offered to the seventh degree. See also *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (3). With regard to the right of succession of the widow of a collateral relation to the deceased reference was made to *Bai Amrit* v. *Bai Manik* (4); *Peddamuttu Viramani* v. *Appu Rau and Others* (5); *Pranshunkur* v. *Prankoonwur* (6); See also *Mussumat Ayabutee* v. *Rajkishen Sahoo* (7); *Soorendronath Roy* v. *Mussumut Heeromonee Burmoneah* (8); *Gridhari* v. *Government of Bengal* (9); 2 *West* and *Buhler*, ch. 1, sect. 2, ss. 3, pp. 137, 169 (1st ed.)

Leith, Q.C., and *Scoble*, Q.C. (*Mayne*, with them), for the Respondents, contended that the two first-named Appellants were not the nearest heirs of *Mooljee Nundlall*. Under the Mitakshara, the system of inheritance is based on the principle of sapindaship by propinquity of relationship rather than upon sapindaship through connection by funeral oblations. See *Mayne* on Hindu Law, sect. 436. The Respondent is a nearer heir to the deceased. The three questions on which her claim depends are: 1. What is the *gotra* of a wife on her marriage? 2. If she takes the *gotra* of her husband, does she become *gotraja-sapinda* of her husband? 3. If so, does she become *gotraja-sapinda* in his family generally? These questions must be answered in the affirmative as regards the *Bombay* Presidency. She becomes so identified with the family of her husband that her funeral rites cannot be performed by her own family, but by that of her husband. Sapindaship is explained

(1) 2 Beng. L. R. (F.B.) 28.
(2) 2 Moore's Ind. Ap. Ca. 132, 149, 158.
(3) 13 Moore's Ind. Ap. Ca. 392.
(4) 12 Bomb. L. R. 79.
(5) 2 Madras H. C. R. 117.
(6) 1 Borr. 427.
(7) 3 Beng. S. D. A. (Sel. Dec.) 28, see also p. 33.
(8) 12 Moore's Ind. Ap. Ca. 81.
(9) 12 Moore's Ind. Ap. Ca. 448.

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in the Mitakshara, c. 1, and means constructive consanguinity. By becoming gotraja she also becomes sapinda, *i.e.*, not so much connected by the *pinda* as by consanguinity actual or constructive: *Mayne's* Hindu Law, sect. 453. The Mayukha follows the Mitakshara. See also the Achara-Kanda, translated at p. 141 of 1 *West* and *Buhler*. The widow can perform the ceremonies for three generations of her husband's ancestors; see *Menu*, c. ix., sl. 28; 3 *Coleb.* Digest, pp. 458, 466; *Gridhari Lall* v. *Government of Bengal* (1). The Respondent comes in in her sapinda order, before the widow of the first cousin, after the grandfather as one of his line, and as his *gotraja sapinda*. The widow, no doubt, is not mentioned in the Mitakshara, but the list of gotraja sapindas is no more exhaustive than that of bandhus. Even if her heritable right must be referred to the efficacy of her funeral oblations, and not to her community in corporal particles, still she would be entitled in preference to the Appellants: *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (2); *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (3); *The Shivagunga Case* (4); *West* and *Buhler*, ed. (1867), p. 145; Dayabhaga, sect. vi., sl. 1; Smriti Chandrika, c. xi. sect. 5. The heritable capacity of woman in *Bombay* being thus established, she is entitled to take her place as a sapinda in due order. The Appellants have cited no case to shew her incapacity or exclusion. Reference was made to Vera Mitrodaya, c. iii. sec. 4; 2 *West* and *Buhler*, p. 109; 7 Asiatic Researches, pp. 180, 181; *Colebrooke's* Essays, and to the decided cases collected in *West* and *Buhler*, 1st ed., pp. 115, 169, 172, 194; 2nd ed., pp. 195, 197, 199; *Dhoolubh Bhaee* v. *Jeevee* (5); *Muhalukmee* v. *Three Grandsons of Kripashookul* (6); *Mussumut Jethee and others* v. *Mussumut Sheo Baee* (7); *Roopchund Talukchund* v. *Phoolchund Dhurmchand* (8); *Steele's* Law and Customs of Hindu Castes, p. 27 [new ed.], p. 225. *Stokes'* Preface to Hindu Law Books, p. 8; *Bhyah Ram Sing* v. *Bhyah Ugur Singh* (9); *Lukshmibai* v. *Jayram Hari* (10).

(1) 12 Moore's Ind. Ap. Ca. 448.
(2) 2 Beng. L. R. (F.B.) 28.
(3) 5 Beng. L. R. 15.
(4) 6 Madras H. C. R. 310.
(5) 1 Borr. Bomb. S. D. A. 67.
(6) 2 Borr. 510.
(7) 2 Borr. 588.
(8) 2 Borr. 616, 2nd ed. p. 670.
(9) 13 Moore's Ind. Ap. Ca. 391.
(10) 6 Bomb. A. C. J. 152.

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The question which arises in this appeal relates to the succession to the estate of *Mooljee Nundlall*, a Hindu inhabitant of *Bombay*, which opened on the death of his widow *Surusvuthebai*. *Mooljee* died in 1840, leaving as his only child a daughter, who died childless in the lifetime of his widow. The widow died in 1862.

At the time of *Mooljee's* death, his paternal first cousin, *Gungadass Vizbhoocundass*, was his nearest male relative. He died in the lifetime of *Mooljee's* widow, leaving no son, but leaving a widow *Mancooverbai*, the original Defendant in this suit, and two daughters, who all survived *Mooljee's* widow. *Mancooverbai* died during the progress of the suit, and the Respondent *Cassibai* is her executrix.

The first and second Plaintiffs in the suit claim to be entitled to the estate of *Mooljee*, as being his nearest male heirs when the succession opened on the death of his widow.

Their relationship is clearly stated in the following passage of the judgment of Chief Justice *Westropp*:—

"It has not been denied that, according to the law, which under the Mitakshara and Mayukha prevails in this Presidency, *Lulloobhoy* and *Moolchund* (the father of *Cassidass*, the second Plaintiff) were gotraja-sapindas of *Mooljee*; the common ancestor of them and of *Mooljee* was *Motilall*, who, counting inclusively, was sixth in ascent from *Mooljee*, and the brothers *Lulloobhoy* and *Moolchund* were seventh in descent from *Motilall*. They are therefore on the extreme verge of sapinda relationship."

The other Plaintiffs are purchasers from the first two Plaintiffs.

Several of the issues raised in the suit have been finally disposed of by the Courts in *India*, and the single question to be now decided is, whether by the Hindu law of inheritance prevailing in *Western India*, *Mancooverbai*, the widow of *Gungadass*, who as paternal first cousin was related in the third degree to *Mooljee*,

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became by her marriage with *Gungadass* a gotraja-sapinda of *Mooljee*, and as such entitled to succeed to his estate in preference to the first and second Plaintiffs, who were related to him only in the remote degree above indicated.

Mr. Justice *Bayley*, sitting as a Judge exercising the original jurisdiction of the High Court, on his first hearing of the cause decided in favour of the right of the widow, following the decision of a Division Bench in the case of *Lakshmibai* v. *Jayram Hari* (1). Upon a remand of the case on other points, Mr. Justice *Bayley*, acting on his own opinion, came to an opposite conclusion upon the question of the widow's right from that arrived at in the decision he had before followed, and gave a decree in favour of the Plaintiffs. On appeal, this last decree was reversed by the unanimous judgment of a full Bench of the *Bombay* High Court, and Mr. Justice *Bayley's* original judgment was restored.

It is fully acknowledged by the learned Judges of the High Court that the law prevailing in *Bengal* and *Southern India* is opposed to the right claimed by the widow; but they arrived at the conclusion that a different interpretation of the law has been accepted in *Western India*, and the elaborate judgments of the Chief Justice (in which Mr. Justice *Sargent* concurred) and of Mr. Justice *West* are directed to elucidate the grounds on which the distinction rests.

The books whose authority is principally followed in *Western India* are *Menu*, the Mitakshara, and the Mayukha. These are stated by the Chief Justice, and, no doubt, correctly, to be "the reigning authorities" in the Presidency of *Bombay*. The learned Judges have sought to support their decision in favour of the widow from passages found in these works. It is acknowledged that the rule of succession to which they have given effect is but dimly enunciated in these passages, but the Judges have considered that the interpretation which has been given to them in *Western India*, evidenced by decisions and the opinions of Shastris, has fixed and determined the law for that part of *India*.

A text of *Menu* was cited, which is supposed to affirm the right of women to inherit:—"To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then,

(1) 6 Bomb. H. C. R. 152.

on failure of sapindas and their issue, samanodaka or distant kinsmen shall be the heir." (Chap. IX., pl. 187.) The words "male or female" appear to have been imported into the text by Sir *W. Jones* and Mr. *Colebrooke* on the authority of a commentator, *Kalluka Bhatta*. Even if it be assumed that these words are rightly introduced, the text, though it sanctions the principle that women may inherit as sapindas, and so is consistent with the right of the widow to inherit as a sapinda of her husband's family, does not affirm that right.

According to the received doctrine of the *Bengal* and *Madras* schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of *Baudhayana* which declares that "women are devoid of the senses, and incompetent to inherit." The same doctrine prevails in *Benares*; the author of the Viramitrodaya yields, though apparently with reluctance, to this text. (Chap. III., part 7.)

The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in *Western India*, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case. She still, however, has to establish that she is a gotraja-sapinda of her husband's family, and as such entitled by the law prevailing in *Bombay* to inherit the estate of one of its members.

It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. But a statement of the doctrine in a note by Mr. *Borradaile* to his reports may be referred to. He says, "because a woman on her marriage enters the gotra of her husband, so Respondents, being sugotras of *Pitambur*, are sugotras of his wife also" (1 *Borr.* 70, n. 2). Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered.

The following passage from the Achara Kanda of the Mitakshara was cited to shew that sapinda relationship depends on having the particles of the body of some ancestor in common, and not on the

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connection derived from the capacity of making funeral offerings. It was also cited for the declaration that husband and wife and brother's wives are sapindas to each other:—

"(He should marry a girl) who is non-sapinda, *i.e.* (1), a sapinda (with himself). She is called his sapinda who has (particles of the body) (of some ancestor) in common (with him). Non-sapinda means not his sapinda. Such an one (he should marry). Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because, through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda relationship) to his maternal grandfather, and the rest through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda relationship) with paternal uncles and aunts and the rest. So also the wife and the husband are sapinda relations to each other, because they together beget one body (the son). In like manner brother's wives also are (sapinda relation to each other) because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore, one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

A translation of some passages in the Sanskara Mayukha to the same effect will be found in the judgment of Chief Justice *Westropp*, of which the following is an extract:—

"Therefore (to explain the different parts in the formation of the word 'Asapinda' by dissolving the compound 'Asa-pinda,')

(1) *Sic.*

she is sapinda who has one and the same pinda (body) (*i.e.*) Dehavayava (constituent atoms) *na* (not) *sapinda* is Asapinda. Thus, therefore, the father's constituent atoms, viz., blood, fat, &c., directly enter into the body of the son, and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great-grandfather, &c., also somehow the transmission of constituent atoms mediately exists. So with the mother, &c., also so the wife has sapindya from the husband, because they are the generators of one body. In some instances, sapindya exists by reason of being the holders of the same constituent atoms. Thus, the wives of brothers are sapindas to each other, for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the sapindya in other cases also should be inferred."

Vijnyanesvara and *Nilakantha* were, no doubt, treating in these passages of sapinda relationship in connection with marriage; but no further definition of sapindas is given in those parts of their respective books which treat of inheritance. The learned Judges below have inferred, in the absence of any indication to the contrary, that the above-mentioned definitions were intended by the authors of the Mitakshara and the Mayukha to apply wherever in those books sapindaship was treated of, and consequently where it was treated of in relation to the right to inherit.

In addition to the above-mentioned authorities, the Chief Justice refers to the Dattaka Mimansa, as strongly maintaining the doctrine that sapindaship depends upon community of corporal particles, and not upon the presentation of funeral offerings to the pitris.

It was contended by the learned Counsel for the Respondents that, even if sapindaship for the purpose of inheritance had to be determined by the efficacy of funeral oblations, the widow would be entitled as a gotraja to succeed, because her offerings would benefit the manes of her husband's grandfather *Kissoredass*, the common ancestor (in the third degree) of her husband and *Mooljee*. Their Lordships do not think it necessary to consider the authorities on which this contention was supported (though

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they may observe that a judgment of Mr. Justice *Dwarkanath Mitter* affirming that a sister's son is, under the Mitakshara, as interpreted in *Benares*, entitled to succeed, throws great light on the subject (1); since they are prepared to assent to the conclusion to which the Judges of the High Court, upon consideration of the authorities, arrived, that by the law of the Mitakshara, as interpreted and accepted in *Western India*, the preferential right to inherit in the classes of sapindas is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these tests was adopted.

If then, as already pointed out, the wife upon her marriage enters the gotra of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consistent with this theory of sapinda relationship to admit the widow so to inherit, the existence of the right has still to be established.

It is acknowledged that the widow of a collateral relative is nowhere specified and named as heir to members of her husband's family; she must therefore come into the succession, if at all, as one of the class of gotraja-sapindas, and it is in this way that her claim has been put forward at the Bar.

The author of the Mitakshara, after discussing in detail the series of heirs first entitled to inherit down to brother's sons, proceeds in c. 2, s. 5, to treat of the succession of Gentiles. Extracts from this section are given in the judgment (2) of the Chief Justice, the translation of Mr. *Colebrooke* being amended by substituting for the English rendering of the names of the various classes of kindred, the Sanskrit names given in the original.

The six first slocas are thus rendered:—

"'1. If there be not brother's sons, gotrajas (3) share the

(1) 2 Beng. L. R. (F.B.R.) 28. (2) Ind. Law Rep. (*Bombay* Series) ii. 431.
(3) Trans. by Colebrooke, "Gentiles."

estate. Gotrajas are the paternal grandmother and sapindas (1) and samanodakas (2).'

"2. In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before (3) cited, 'And the mother also being dead, the father's mother shall take the heritage' (4). No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course succeed immediately after the nephew; and thus there is no contradiction.

"3. On failure of the paternal grandmother, gotraja-sapindas (5) —namely, the paternal grandfather and the rest—inherit the estate."

For binnagotra sapindas (6) are indicated by the term bundhu (7).

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of samanagotra sapindas (8).

"6. If there be none such, the succession devolves on samanodakas (9), and they must be understood to reach the seven degrees beyond sapindas (10), or else as far as the limit of knowledge and name extend. Accordingly *Vhrat Menu* says, 'The relation of

(1) Trans. by Colebrooke, "relation connected by funeral oblations of food."

(2) Trans. by Colebrooke, "relations connected by libations of water."

(3) Mitak. ch. ii. s. 1, pl. 7.

(4) Menu, ch. ix. pl. 217.

(5) Trans. by Colebrooke, "kinsmen sprung from the same family with the deceased, and connected by funeral oblations."

(6) Trans. by Colebrooke, "kinsmen sprung from a different family, but connected by funeral oblations."

(7) Trans. by Colebrooke, "Cognate."

(8) Trans. by Colebrooke, "kindred belonging to the same general family and connected by funeral oblations."

(9) Trans. by Colebrooke, "kindred connected by libations and water."

(10) Trans. by Colebrooke, "the kindred connected by funeral oblations of food."

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the sapindas ceases with the seventh person, and that of samanodakas (1) extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra (2).'"

It cannot be said that these passages contain direct authority for the admission of a widow of a collateral relative to inherit as a sapinda to a member of her husband's family; but they were cited to shew that women are entitled to inherit as sapindas, the paternal grandmother being named as the first sapinda for this purpose. There is a passage also to this effect in the Mayukha, c. 4, s. 8, pl. 18.

That the mention of certain members of the family as gotraja sapindas is not exhaustive, and that others than those expressly mentioned may be included in the class, may be inferred from the following passage in pl. 3 of c. 2, s. 5, of the Mitakshara cited above:—"On failure of the paternal grandmother, gotraja-sapindas, namely, "grandfather *and the rest*, inherit the estate." It would seem, also, though the grandmother and great-grandmother are alone expressly mentioned, that the wives of the remoter ancestors in the direct ascending line up to the seventh degree would likewise succeed to their descendants as sapindas. Moreover, it has been decided by this Board that the enumeration of bundhus contained in the Mitakshara is not exhaustive: *Girdhari Lall* v. *The Bengal Government* (3). The reasons for so holding are applicable to the enumeration of sapindas, though, as Mr. *Graham* observed, the step from the wives of paternal ancestors to the wives of collaterals is a long one.

Mr. Justice *West*, after discussing the Mitakshara and some of its commentators, came to the conclusion that "upon the whole it would appear more probable than not, upon the text of the Mitakshara and its recognised exponents, that it did intend widows to be included among the gotrajas." Perhaps the most that can be said is, that the text of the Mitakshara is not inconsistent with the claim of the widow, and allows of an interpretation favourable to her right to inherit. The important point for con-

(1) Trans. by Colebrooke, "those connected by a common libation of water."

(2) Trans. by Colebrooke, "the relation of family name."

(3) 12 Moore, Ind. Ap. Ca. 448.

sideration remains, namely, whether such an interpretation has been given to the Mitakshara by its expounders and the lawyers of the *Bombay* school, and has been so sanctioned by usage and decisions as to have acquired the force of law.

The Mayukha is also very fully discussed in the judgment of Mr. Justice *West*, and his consideration of it led him to the conclusion that, if the "foundation of the rights of widows of gotrajas under the Mitakshara is slender, under the Mayukha it may be called almost shadowy." After this appreciation of the two leading authorities by a Judge who has much studied them, it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage.

Commentators on the Mitakshara are referred to in the judgments below who have interpreted its text in a sense highly favourable to women. Two of them, whose opinions are closely applicable to the point under discussion, are thus referred to by Mr. Justice *West*:—

"*Visvesvara*, the author of the Subobhini, the chief commentary on the Mitakshara, says that 'gootraja' may properly be taken to include both males and females; and *Balambhatta*, insisting on the same view, applies it to the determination of the right of a predeceased son's widow, whom he places next after the paternal grandmother."

The author of the Vaijayanti, a commentary on *Vishnu*, appears to have held that the son's widow would succeed in preference to the daughter. This opinion is referred to in the remarks of Mr. *Colebrooke* upon a case in the Appendix to *Strange's* Hindu Law (vol. ii. p. 234). Mr. *Colebrooke* thinks that it is opposed to the prevalent doctrine of the school of the Mitakshara, which is that the daughter inherits in preference to the son's widow. He does not appear to question the right of the widow to inherit as a sapinda, though no doubt it was unnecessary to do so in discussing the question of preference.

Their Lordships will now pass to the recorded answers of the Shastris, and the decisions of the Courts bearing on the question.

The answers of the Shastris, which have been referred to at the Bar, will be found in a Digest of the Hindu law of inheritance by Messrs. *West* and *Buhler*, compiled from the replies of the Shastris

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recorded in the Courts of the *Bombay* Presidency. Mr. *West* is the Judge of the High Court whose judgment has been already adverted to. These replies are in many cases unsatisfactory and incorrect, but they are numerous, and the series taken as a whole undoubtedly recognises and affirms the right of the widow to inherit as a gotraja-sapinda to members of her husband's family. It is not necessary to refer to these answers in detail. Many of them are cited and commented upon in the judgment of Mr. Justice *West*, and among these are answers which affirm that a sister-in-law inherits in preference to distant cousins, and even to first cousins, of the *propositus*.

Some early decisions of the Sudder Adawlat, reported by *Borradaile*, are to the same effect. In the case of *Dhoolubh Bhaee and Others* v. *Jeevee* (A.D. 1813), it was held that *Jeevee*, the widow of the son of a brother of *Pitamber*, the *propositus*, was entitled (on the death of *Pitamber's* widow) to succeed to his estate, and to hold it for her life in preference to a great grandson of another brother of *Pitamber* (1). It is not, however, stated in the report when *Jeevee's* husband died.

In another of the cases cited from *Borradaile* (*Muhalukmee* v. *The Grandsons of Kripastrookul* (2), the Sudder Court held that a predeceased son's widow was entitled to succeed in preference to the sons of a daughter. This case, however, seems to have been decided upon a custom of the caste of Oudeech Brahmins. As a decision on the general law, apart from custom, it may not be capable of support, a daughter's son being specially provided for by the Mitakshara (c. 2, sec. 2, pl. 6).

In a later case reported in *Borradaile* (1824), it was held that the widow of a predeceased son was entitled to inherit in preference to the brother of the *propositus* (*Roopchund Talukchund* v. *Phoolchund Dhurmchund and Another* (3)). This seems to be a direct decision on the right of the widow to inherit, though whether in the order of heirs the preference was rightly accorded to her in this case may be questioned.

In the case of *Lukshmibai* v. *Jayram Hari and Others*, the High Court of *Bombay* (Justices *Lloyd* and *Melvill*) gave a clear and

(1) 1 Borr. 67. (2) 2 Borr. 510.

(3) 2 Borr. 616.

unqualified judgment in favour of the right of the widow of a predeceased collateral relative to succeed in preference to a more remote collateral male relative of the *propositus*. The High Court expressly found that this order of succession was in accordance with the law of inheritance prevailing on the *Bombay* side of *India*.

The High Court in the present case, after an exhaustive review of the authorities and precedents bearing on the question, have unanimously arrived at the same conclusion. Great weight is undoubtedly due to this decision, not only from the learning and research displayed in the judgments separately delivered by Chief Justice *Westropp* and Mr. Justice *West*, but also from the circumstance that both these learned Judges have had great and peculiar opportunities of becoming acquainted with the law of inheritance prevailing in *Western India*. The Chief Justice has passed a long judicial career in the Courts of *Bombay*, and Mr. Justice *West* is one of the compilers of the digest of the law of inheritance to which reference has already been made. Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in *Bombay* is in favour of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, with costs.

Solicitors for the Appellants: *Ashurst, Morris, Crisp, & Co.*
Solicitors for the Respondents: *Gregory, Rowcliffes, & Co.*

J. C.* 1880 July 13, 14.

MAHARANI RAJROOP KOER . . . . PLAINTIFF;

AND

SYED ABUL HOSSEIN AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Act IX. of 1871, *sect.* 27—*Second Schedule, Part V. Art.* 34—*Limitation—Prescription—Easement—Right to the flow of an Artificial Watercourse.*

In a suit to establish the Plaintiff's right to a pyne or artificial watercourse, and also to a tal or reservoir, and the water flowing from them through the Defendants' estate to his own, and to obtain the removal of certain obstructions, it appeared that the pyne was constructed by the Plaintiff's ancestors at a distant period of time, with compensation to the Defendants, and that the Plaintiff and his ancestors had had peaceable and continuous use for more than twenty years of the water flowing through it and to the overflow water of the tal, after the Defendants had used the water for the purpose of irrigating their said estate, and that all the said obstructions were unauthorized; but it was contended that the Plaintiff's right to recover in respect of them was barred by the *Statute of Limitations*:—

Held, that a grant or some other legal origin of the Plaintiff's right must be presumed, and that Act IX. of 1871, being a remedial statute, did not exclude or interfere with titles and modes of acquiring easements existing independently of the Act; and in particular with those existing independently of sect. 27 of that Act, under which a statutory title could not accrue to the Plaintiff unless a period of twenty years' enjoyment terminating within two years of suit were shewn.

Held, further, that assuming the obstructions to have existed more than two years from the date of suit, they were continuing nuisances as to which the cause of action accrued *de die in diem*, and was not barred by Act IX. of 1871, 2nd Schedule, Part V. Art. 34.

APPEAL from two decrees of the High Court (Feb. 23, 1877) reversing in special appeal two decrees of the Subordinate Judge of zillah *Gya* (Aug. 17, 1875) so far as they were adverse to the Respondents, and restoring a decree of the Court of the Sudder Moonsiff of that district (Aug. 26, 1864), which, as regards the subject of this appeal, was in favour of the Respondents.

The facts appear in the judgment of their Lordships.

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The judgment of the High Court (*L. S. Jackson*, and *McDonnell*, JJ.), was as follows:—

"The questions before the Court in this case are not unlike those which came before this Bench—at least before myself and my colleague Mr. Justice *Glover*—in 1870, which is reported in 14 Suth. W. R., p. 349, with this exception, that the position of parties is reversed. The Plaintiff here is the owner of a pyne which traverses the land of the Defendants. It appears to me that it is scarcely an adequate description of the Plaintiff's right in this case to say that he has a bare easement, or right, to pass water over the Defendants' land for the purpose of irrigating his own. The evidence shews, and the Courts appear to have found, that the pyne was constructed by the ancestors of the Plaintiff a great many years ago, possibly fifty or sixty years, certainly more than twenty years, for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the Defendants which compensated them for any injury or inconvenience caused by the construction of the pyne. In that state of things, it seems that the Defendants have at various times within the last few years made a number of openings in that pyne for the purpose of drawing water, to the injury of the whole village. In this state of the facts what we stated in 14 Suth. W. R. would apply, and we think that if the Defendants were to be at liberty without the Plaintiff's consent to construct a number of openings, and thereby seriously diminish the supply of water carried through the pyne to the Plaintiff's mouzah, that would cause serious disturbance, and Plaintiff would be most wrongfully injured thereby. But to this state of the rights of the parties we have to apply the provisions of the Limitation Act; and we find that the Plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time that such infringement took place. The Moonsiff found, and it appears to us on very good grounds, that as regards two of the openings from which the Plaintiff complained that he sustained injury they were in existence much more than two years before the commencement of the suit. Of course the Subordinate Judge might, if the evidence permitted it, come to a different conclu-

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sion upon that part of the case, and the Plaintiff's vakeel suggests that he did intend to do so by the use of these words—'With reference to the dhonga and khund, the Moonsiff has referred to the papers filed by the Plaintiff, but those papers do not refer to the dhongas and khund in particular;' but we do not think that, in these words, the Subordinate Judge meant to reverse the finding of the Moonsiff on a question of fact, for, after the remark which he there makes, he goes on to dispose of part of the case on different grounds by, as is admitted before us to-day, a misapplication of the law of limitation. If we thought that there was any ground for coming to a different conclusion upon this fact, we should have been inclined to remit the case back; but we are satisfied that the Moonsiff's finding on this point is unassailable. Concurring, therefore, in the general view taken by the Court below of the rights of parties, and being of opinion that the decision of the Moonsiff is correct as regards the khund and the dhonga mentioned by him, and being also of opinion that the cross appeal filed by the Plaintiff in regard to the use of the tal has no force, we think that the judgment of the Lower Appellate Court, so much as varies the judgment of the Moonsiff, must be set aside, and that the Moonsiff's decision must be restored. The Defendants' appeal is allowed, and the Plaintiff's appeal dismissed. Each party will pay his own costs of this appeal."

Woodroffe, for the Appellant, contended that as regards the two obstructions, No. 3 and No. 10, the Lower Appellate Court had rightly reversed the Moonsiff's finding that they were in existence more than two years before the date of suit, and that the High Court was in error in holding that the Lower Appellate Court had not meant to do so. As regards the evidence and the findings of the Moonsiff and Subordinate Judge, it was not established that the Defendants had a proprietary right in the tal and to the use of the water therein; while it appeared that the Plaintiff was entitled to such water, and was not limited in his rights to the overflow thereof. The tal formed part of a system of irrigation used as of right by the Appellant. The Respondent's predecessors in estate had on the evidence consented to the storing of the water therein for the use of the Appellant's predecessors.

Under these circumstances a grant must be presumed: see *Gooroo-pershad Roy and Others* v. *Bykanto Chunder Roy* (1); *Mahomed Ali and Others* v. *Joogool Ram Chunder* (2). The title so derived was independent of the Indian *Limitation Act* IX. of 1871. So long as there had been peaceable and continuous user for twenty years, whether the obstruction complained of had existed more than two years or not, there was a good title in the Appellant, independently of sect. 27 of the Act. As regards clause 34 of the second schedule, that must be read with reference to sect. 24, and is inapplicable. This was a continuing injury giving a continuous cause of action; though under the Act it may be that only two years' damages can be obtained: see *Whitehouse* v. *Fellowes* (3); *Gillon* v. *Boddington* (4). Moreover, whether for purposes of limitation, or as affecting title under sect. 27, the obstruction or interruption of the Appellant's enjoyment must be shewn to have been acquiesced in by him: see *Flight* v. *Thomas* (5).

C. W. Arathoon, for the Respondents, relied upon the judgment of the High Court and upon the statement of the law of limitation therein contained. He referred to *Juggessur Singh* v. *Nund Lall Singh* (6). He contended that the openings and obstructions were of old standing, and were shewn on the survey map, more particularly No. 10. The Appellant had failed to prove that the easement had been peaceably enjoyed within the meaning of sect. 27 of the Act of 1871. There had been litigation extending over a number of years, and the injury in this case was not a continuing one. Further, as to No. 3 obstruction, the Appellant was bound so to use the same as not to injure the Respondents' land by inundation or otherwise.

Woodroffe replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This was a suit brought by Maharajah *Ram Kissen Singh Bahadur* to establish an asserted right to a pyne or artificial

(1) 6 Suth. W. R. 83.
(2) 14 Suth. W. R. 124.
(3) 30 L. J. (N.S.) (C.P.) 305.
(4) 1 Ry. & Mood. 161.
(5) 10 Ad. & E. 590; S. C. 8 Cl. & F. 231.
(6) 20 Suth. W. R. 283.

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watercourse, and also to a tal or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the pyne. The Maharani, the present Appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court, as to the effect of the *Statute of Limitations* upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated: The Maharajah and his ancestors were the owners of mehal *Sunout Purwurya*, in the district of *Gya;* and the Defendants were the owners of an estate called mouzah *Mora*. The system of irrigation claimed by the Plaintiff embraces an artificial pyne which is fed by a natural river at a point to the south of the Defendants' mouzah. The pyne, which runs from the south in a northerly direction, after traversing other estates, enters mouzah *Mora*, and runs through it, and afterwards through other lands to the Defendants' mehal. There is, branching from the main pyne, a channel or smaller pyne which helps to feed the tal claimed by the Plaintiff. The tal lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the pyne, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the tal which runs from it and joins the pyne at a point near a bridge, described in the Moonsiff's map. It is said there were doors or sluices in the bridge by which the flow of the water had been to some extent regulated, but no question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the pyne.

The general result of the litigation below is, that the Plaintiff succeeded in establishing his right to the pyne as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel, but failed to establish his right to the water in the tal, except to the overflow after the Defendants, as the owners of mouzah *Mora*, had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the Plaintiff.

It was found in the Courts below that all the obstructions were unauthorized; and the Plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a khund or channel cut in the side of the pyne at a point below the bridge which has been spoken of. No. 10 is a dhonga, also below the bridge, and consists of hollow palm trees so placed, as to draw off the water in the pyne for the purpose of irrigating the Defendants' land. No question arises here as to the fact that those two works are an interruption of the Plaintiff's right; and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the *Statute of Limitations*.

The Moonsiff has found that the statute opposes a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Moonsiff's decree. On special appeal to the High Court, the Judges of that Court concurred with the Moonsiff, and, reversing the decree of the Subordinate Judge, affirmed the Moonsiff's judgment.

Before adverting to the statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Moonsiff found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found that the two obstructions were recently made; and it may be inferred, from his disagreeing with the inferences which the Moonsiff drew from certain accounts which were produced, and the comments he made upon the latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Moonsiff that the obstructions had existed for two years. If they had not existed for that period, no question on the statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Moonsiff on the question of fact, and, therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Moonsiff upon the fact of the length of time during which these obstruc-

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tions had existed; but, assuming the fact to be as the Moonsiff and the High Court have regarded it, namely, that these obstructions had existed for more than two but for less than twenty years, they think that no provision of the *Statute of Limitations* interferes with the Plaintiff's right to recover in respect of them.

The *Limitation Act*, No. IX. of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part 4 of the Act, and are introduced under the heading "Acquisition of Ownership by Possession." They enact a mode of acquiring ownership by possession or enjoyment. Sect. 27 is as follows: "Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such access and use of light- or air-way, watercourse, use of water, or other easement, shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Moonsiff certainly proceeded; though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this: "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

On the assumption of fact made by the Moonsiff that these obstructions had existed for more than two years before the suit he might be right in finding that the Plaintiff had not had peaceable enjoyment for twenty years, ending within two years before the institution of the suit, and, therefore, that the Plaintiff had acquired no title by virtue of this statute. The object of the statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title

under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that in this case there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Moonsiff and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shews, and the Courts appear to have found, that the pyne was constructed by the ancestors of the Plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the Defendants, which compensated them for any injury or inconvenience caused by the construction of the pyne." This being an artificial pyne, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since or at least down to the time of the obstructions complained of by the Plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the Plaintiff's mehal and the Defendants' land by which the right was created. That being so, the Plaintiff does not require the aid of the statute: and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Moonsiff decided.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. *Woodroffe* upon the effect of the clause in the same 27th section under the head "explanation," which defines what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in *Flight* v. *Thomas* (1) in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the *English Prescription Act.*

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment

(1) 10 Ad. & E. 590; S. C. 8 Cl. & F. 231.

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on the part of the statute which relates to limitation properly so called; namely, on Article 34 of Part V. of the Second Schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the Plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringment took place." If the Judges really meant to apply the limitation of Article 34 above referred to, their decision is clearly wrong; for the obstructions which interfered with the flow of water to the Plaintiff's mehal were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. Indeed, sect. 24 of the statute contains express provision to that effect. For these reasons their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

There remains to be noticed the contention raised as to the tal. Mr. *Woodroffe* has strongly argued that the findings as to the tal in favour of the Defendants are wrong, and he further endeavoured to shew by reference to the judgments that they were not conclusive on that part of the case. Their Lordships, however, find that there are distinct judgments of the Moonsiff and of the Subordinate Judge to the effect that the Defendants had a proprietary right in the tal and to the use of the water in the tal, and that the Plaintiff had no right to the tal or to the water in it, except to so much as flows out of it in a natural course to the Plaintiff's pyne. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the Appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Moonsiff be modified in accordance therewith.

Mr. *Woodroffe* desired that the language of the Moonsiff's decree with regard to the enjoyment of the water in the tal should be modified. Their Lordships, having considered what was addressed to them on the subject and the language of the Moonsiff's decree, are not disposed to interfere with it. The Plaintiff having claimed the whole of the water in the tal, they think that the Moonsiff had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the Plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the Defendants. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. The Moonsiff having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially, it amounts to a declaration that the Defendants are entitled to use the water of the tal for the irrigation of their estate. If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships having considered the question of costs, and the Plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.

Solicitors for the Appellant: *Henderson & Co.*

Solicitor for the Respondents: *T. L. Wilson.*

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MAHASHOYA SHOSINATH GHOSE AND OTHERS . . . . . } PLAINTIFFS;

AND

SRIMATI KRISHNA SOONDARI DASI . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Law—Sudras—Adoption—Actual Delivery of the Child.

Although amongst Sudras, no ceremonies are necessary in addition to the giving and taking of a child in adoption; yet it must not be inferred therefrom that there can be such a giving and taking as is necessary to satisfy the law, even amongst Sudras, by mere deed, without an actual delivery of the child by the father.

But *held*, in this case, that on the evidence certain deeds of gift and acceptance of a child, duly executed and immediately registered, had not been intended by the parties as a complete adoption; the terms of the deeds themselves not being necessarily inconsistent with such finding.

APPEAL from a decree of the High Court (Feb. 5, 1878) affirming a decree of the District Court of *Bhagulpore* (Feb. 8, 1876) dismissing the Appellants' suit.

The facts are stated in the judgment of their Lordships.

Cowie, Q.C., and *Branson* (*Evans* with them), for the Appellants, contended that the deeds of adoption were in themselves sufficient to effect the adoption; and that on the evidence the giving and taking in adoption did in fact take place. They referred to the report of a former case relating to these deeds in Law Rep. Ind. Ap. Supp. Vol. p. 149, and to *Indromoni Chowdhrani* v. *Behari Lal Mullick* (1).

Doyne, and *Woodroffe*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The question in this case is whether the Plaintiff has been validly adopted as the son of *Dwarkanath Ghose*, who died on the

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 7 Ind. Ap. 24.

30th of June, 1863, by his widow, the Defendant. It is admitted that she had authority from her husband for that purpose, and the adoption is alleged to have taken place on the 11th of June, 1864.

Their Lordships do not propose to go at any length into the facts of the case, which are fully and lucidly stated in the two able judgments that are the subjects of this appeal. It is sufficient to refer to a few of them. It appears that the widow lost no time in seeking to carry out her husband's direction to adopt a son. A correspondence, which was carried on chiefly by *Soorjonarain Singh*, her brother, who took the principal part in all these transactions, began in January, 1864; from which it appears that, whatever unwillingness *Srinarain*, the natural father of the Plaintiff, may have felt at first to give his son in adoption, had been overcome before the end of the following May. The record contains only the letters written by *Soorjonarain* during this period; but from them it may be inferred that *Srinarain*, in one or other of his letters that are missing, had stipulated for the execution of deeds and gift of acceptance which, if witnessed as was contemplated by the reversionary heirs of *Dwarkanath Ghose*, would afford evidence against them of the adoption and of the authority under which it was made. It may also be inferred that at one time it was contemplated that the Defendant should send persons to bring the boy, without his father, to her house at *Bhagulpore* from *Mahta*, his father's place of residence, in order that she might see him before adopting him. Ultimately, however, *Srinarain* himself accompanied the boy, and came to *Bhagulpore* on the 7th of June, 1864; and it may be that there was at that time some notion in the minds of all the parties that the adoption would then take place. However this may be, it is an undisputed fact that the deeds upon the construction of which the determination of this appeal must now depend were executed on the 11th of June, 1864. It is, on the other hand, equally clear, that the boy, instead of remaining with the Defendant in her house, went back with his natural father to *Mahta* on the following day, the 12th of June, 1864. He afterwards returned to the Defendant's house, together with his brothers, who at least were only there on a visit, in September, 1864, whilst *Srinarain* was on

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a pilgrimage. The brothers went home in November, but the boy remained in the house of the Defendant. There appears to have been on the part of the father some remonstrance as to this, or, at all events, the expression of a wish that the boy should be sent back to him; and accordingly the boy was sent back to his father's house, in December, 1864, as it was expressly stated in the letter which accompanied him on his return, agreeably to his father's order. After that period he never returned to the Defendant's house. Further correspondence ensued, and ultimately, on the 25th of March, 1865, *Srinarain* himself wrote a letter, in which, after stating the boy's repugnance to leave his own home, the repugnance probably being that of his mother to part with him, and the general feeling of the family, he ends by saying: "In this I have no power, as I have already informed you in my previous letter; and now I positively inform you that you all, relinquishing this hope, in consideration of the future, for the preservation of the estate, should make dattak-grahan (accepting a son in adoption) or any other arrangement you think fit;" pointing evidently to the adoption of another child by the Defendant.

In this the Defendant appears to have acquiesced; but it was suggested on her part that the deeds which are in question ought to be cancelled, in order to remove the cloud which would otherwise rest on the title of any other boy whom she might adopt. For nearly a year *Srinarain* seems to have thought that this was the right and proper thing to be done, and to have been willing to concur in it; but in March, 1866, he, having probably been advised, during a visit he was then paying to *Calcutta*, that his right to do so was at least questionable, refused to do it, and determined to leave things as they were; not, however, even then insisting on the adoption as complete and irrevocable. Thereupon the suit which has been before their Lordships on a former occasion was brought by the present Defendant, seeking to have those deeds cancelled. In the course of that suit the validity of the adoption came in question; the Courts in *India* pronounced against it, and decided that the deeds should be delivered up to be cancelled. On appeal to Her Majesty, their Lordships were of opinion that the suit was improperly brought, and could not be maintained, being one in the nature of a suit for a declaratory

decree, and brought in the absence of the child said to have been adopted; and they finally dismissed it, leaving every question touching the validity of the adoption open.

So matters remained until the Plaintiff came of age, and he then brought the present suit to enforce his rights as an adopted son.

The case made by him, and the case tried in the Courts below, was not that he had a good title by adoption by virtue of the deeds in question alone; but treated the execution of those deeds as contemporaneous with the performance of all the ceremonies incident to an ordinary adoption. There was great conflict of evidence upon the case so set up; and ultimately both the Indian Courts, in extremely well-reasoned judgments, found that no such formal adoption, as was alleged, ever took place, and dismissed the suit. A suggestion, however, as appears at the end of the judgment of the High Court, was made by one of the counsel for the Plaintiff, to the effect that, even if there had been no such formal adoption as was alleged, the deeds themselves operated as a complete giving and taking of the Plaintiff; that that was all that was essential in the case of Sudras; and that the adoption was completed by virtue of the deeds alone.

Their Lordships, by their ordinary rule, are precluded from going into the correctness of the findings of the two Courts upon the fact of the formal adoption attempted to be proved. This has been fairly admitted by the learned counsel for the Appellants at their Lordships' Bar, who have accordingly argued only the latter point, namely, whether the effect of the two deeds was not to make the Plaintiff fully and completely the adopted son of *Dwarkanath Ghose*.

It seems to their Lordships that two questions arise upon this point: first, whether, according to Hindu law, an adoption can be effected, even amongst Sudras, by the mere execution, without more, of such instruments as those in question; and secondly, whether it was the intention of the parties, when they put their hands to those two instruments, that such should be the case, or whether the execution of them was not intended to be a mere step in the proceedings which were to result at one time or another in a complete and full adoption. Their Lordships will deal with the last of those questions in the first instance.

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The first thing that strikes them is the extreme improbability that it should have been the intention of the parties to make an adoption by the mere execution of the deeds. Yet that such must have been their intention, if there was then a complete adoption, follows from the findings of the Courts that nothing more was done, or, presumably, intended to be done. Such a course of proceeding seems to be in the highest degree repugnant to the ordinary habits, feelings, and usages of two Hindu families both of considerable respectability. That this is so is shewn by the circumstance that the Plaintiff has thought (as the father in the former suit thought) it necessary to set up a case of formal and full adoption, with all ceremonies, whether necessary or not necessary; being the case which has been negatived by the two Courts. Nor does it appear to their Lordships that the terms of the deeds are necessarily inconsistent with the finding of the High Court that such was not the intention of the parties. The words of the deed of acceptance, no doubt, are strong, and are, as translated, in the present tense. Those words, according to the translation on the present record, are these:—"I take in adoption *Srinain Nogender Chunder Mitter*, the second son of your third wife, *Sriwati Monmohini*, with the consent of all, and according to rule and usage." In the record of the former case before their Lordships there is a somewhat different and more expanded translation of the same passage, the terms of which are:—"I do, with the prescribed rights and ceremonies, adopt as my son *Nogendro Chundro Mittro*, your second son by your third wife, *Sreemutty Monmohinee*." The words "with the prescribed rights and ceremonies" are stronger than the words "according to rule and usage;" but, even taking, as their Lordships do, the latter to be the correct translation, it seems to them that the words point to an adoption in the customary and formal manner, and to something being done *ultra* the mere execution of those two instruments.

Great stress has been laid by Mr. *Branson* particularly, upon the immediate registration of the deeds. But as to that their Lordships think that, although the circumstance of registration, as well as that of the execution of the deeds, would, of course, be very cogent evidence upon the main issue which was tried in the case, namely, whether there had been a formal and regular adop-

tion; and might, if the other evidence that was given upon that point had been nicely balanced, have been sufficient to turn the scale; it is of far less weight upon the question whether it was the intention of the parties, without more, to treat the execution of the deeds as an adoption. It shews, no doubt, what is fully admitted, that both parties then supposed that the adoption would take place at some time.

Their Lordships, therefore, see no reason to differ from the conclusion to which the High Court came upon the whole case,—that it never was the intention of the parties that the deeds should operate in the manner contended for. That conclusion, they think, is very much fortified by the subsequent correspondence that took place; the mode in which the child was treated going from one house to the other; and the clear willingness of the father at one time to treat the adoption as simply inchoate, and something which could be given up, so that the Defendant might carry out her purpose of performing the wishes of her husband by adopting another child. The circumstance, moreover, which the Courts have laid great stress upon—that on the occasion of *Dwarkanath's* sradh the boy supposed to be adopted was not present, and took no part in the ceremony—is strongly confirmatory of the notion that all parties then considered that at that time the adoption was not complete, but remained, to some extent, still *in fieri*.

That being so, it is unnecessary for their Lordships positively to decide the first question, namely, whether there can be, according to Hindu law and usage, an adoption simply by deed, and without that corporeal delivery and acceptance of the child which is almost universally treated as the essential part of an adoption in the dattaka form. They desire, however, to say that they are very far from wishing to give any countenance to the notion that there can be such a giving and a taking as is necessary to satisfy the law, even in a case of Sudras, by mere deed, without an actual delivery of the child by the father. There is no decided case which shews that there can be an adoption by deed in the manner contended for; all that has been decided is that amongst Sudras no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child

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in adoption continues to stand on Hindu law and on Hindu usage, and it is perfectly clear that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the data homan in particular, are in their case requisite. The system of adoption seems to have been borrowed by the Sudras from these twice-born classes; whom in practice, as appears by several of the cases, they imitate as much as they can: adopting those purely ceremonial and religious services which it is now decided are not essential for them in addition to the giving and taking in adoption. It would seem, therefore, that, according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.

For these reasons their Lordships think that no ground has been laid for disturbing the judgment of the High Court; and they will, therefore, humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal, with costs.

Solicitors for the Appellants: *Barrow & Rogers.*
Solicitors for the Respondent: *T. L. Wilson.*

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ACT VIII. OF 1859, ss. 239, 240. See Alienation of Property under Attachment.

ACT XIV. OF 1859, s. 20. See Limitation.

ALIENATION OF PROPERTY UNDER ATTACHMENT. Any alienation of property, subject to a valid and subsisting attachment is null and void as against the attaching creditors and those deriving title under them; unless such alienation can be shewn not to fall within sect. 240 of Act VIII. of 1859.

An objection that the formalities prescribed by sect. 239 and contemplated by sect. 240 have not been duly observed must be taken in the Court below, and cannot be raised for the first time before their Lordships; and, *quære*, whether it is not for the Plaintiff claiming adversely to a Defendant in possession to prove the non-performance of such formalities. *Ram Krishna Das Surrowji Surfunnissa Begum* v. *Richard Hendry and Others* 157

CHASTITY. See Hindu Law.

CONSTRUCTION. The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

Where on the true construction of the operative part of a mortgage instrument it appeared that the same was intended to cover the general balance that might become due by the mortgagors to the mortgagee in the course of their business transactions:—

Held, that the security could not be limited by the recital to such portion only of the general debt as consisted of advances made upon contracts for future delivery of produce, where the words of the recital were not necessarily repugnant to such construction.

Where by an agreement between debtor and creditor prescribing some of the terms on which their future dealings should be carried on, it was provided that an agreed balance should be liquidated by "returns only" made upon future contracts, but the agreement fixed no time for its duration or for such liquidation, or for the extent of business to be done, the result being that if either party were disposed to act unreasonably he would have the means of postponing the liquidation of such balance indefinitely:—

Held, that such agreement was revocable. It could not be implied from the terms of the agreement that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until such agreed balance should be liquidated in the manner thereby

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provided. The parties having abstained from inserting express provisions for the fair and reasonable working of their supposed agreement, the Court would not supply them. *Pallikagatha Marcar* v. *John Gothfried Sigg* 83

2. CONSTRUCTION. In a lease of fifty-one beegahs of land, from the terms whereof it appeared that the lessee's object in taking the said beegahs was that he might quarry therein, erect a factory and carry on mining operations, the lessors covenanted as follows:—

"Within that aforesaid mouzah we will not give a pottah, let give settlement to anybody. If you take possession according to your requirements of extra land over and above this pottah, and we shall settle any such lands with you at a proper rate."

Held, that according to the true construction of this covenant, it related only to such additional land as the lessee or his assigns might require for the purpose of carrying out the object for which the lease was granted.

Quære, whether the lessee could assign the covenant, and whether the purchasers of the adjoining land from the lessors with notice thereof, would be bound thereby. *The New Beerbhoom Coal Company* v. *Boloram Mahata* 107

DESAI. Deshgat watan, or property held as appertaining to the office of desai, is not to be assumed *primâ facie* to be impartible. The burden of proving impartibility lies upon the desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies.

A decree for partition of such property should be without prejudice to the desai's right to such emoluments or allowances for the performance of the duties of the desaiship as he may be entitled to under any law in force. *Adrishappa Bin Gadgiappa* v. *Gurushidappa Bin Gadgiappa* 162

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FORFEITURE OF DECEASED HUSBAND'S ESTATE. See Hindu Law.

HINDU ADOPTION. Where a Hindu adopted a boy without authority from her husband, and the consent of the sapinda had been obtained to an adoption purporting to be made in pursuance of an alleged authority, and had been influenced by undue considerations:

Held, that such adoption was invalid. *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamai and Rangaiyar* 173

HINDU LAW. Under the Hindu law, as administered in the *Bengal* school, a widow who has once inherited the estate of a deceased husband is not liable to forfeit that estate by reason of unchastity. *Moniram Kolita* v. *Kerry Kolitany* 115

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INVALID CONSENT OF SAPINDAS. See Hindu Adoption.

JURISDICTION OF THE COURT ENFORCING DECREE. See Limitation.

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LIMITATION. A proceeding to enforce a decree, taken *bonâ fide* and with due diligence before a Judge whom the party, *bonâ fide* though erro-

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neously, believes to have jurisdiction, is a proceeding within the meaning of sect. 20, Act XIV. of 1859; whether the Judge actually decides that he has jurisdiction, or supposing himself to have jurisdiction acts accordingly.

Roy Dhunput Sing v. *Madhomottee Dabia* (11 Beng. L. R. 23) commented upon. *Hira Lall* v. *Budri Dass* 167

ONUS PROBANDI. See Desai.

PARTIBILITY. See Desai.

POSSESSION. See Regulation XI. of 1825.

PRESCRIPTION. See Regulation XI. of 1825.

RECITALS. See Construction. 1.

RE-FORMATION OF LANDS. See Regulation XI. of 1825.

REGULATION XI. OF 1825. In a suit brought on the 11th of March, 1872, to recover certain plots of land, (1), as re-formations after diluviation of lands which had belonged to the Plaintiffs and as accretions thereto, (2), under a title by prescription; it appeared that the lands had formed in the bed of a river in 1859, and that the Plaintiffs took possession thereof as of re-formed lands and had been maintained in possession under Act IV. awards, but that in 1868 they were ousted by the Collector, who assessed the same under Reg. XI. of 1825, and settled the same with his co-Defendants:—

Held, that whether or not in consequence of Act IX. of 1847 the Government were entitled to assess the lands, they were entitled to oust the Plaintiffs and to take possession of the lands as lands which had originally formed as an island, and were at their first formation surrounded by water which was not fordable;

Held, further, that sect. 15, Act XIV. of 1859, barred the Plaintiffs' title to recover simply on the strength of their previous possession, without entering into the question of title; the suit not having been brought within six months of dispossession.

Held, further, that possession for three years under an order of a magistrate in a proceeding under Act IV. of 1840 does not create a title by prescription. *Wise and Others* v. *Ameerunnissa Khatoon.* *Wise and Others* v. *Collector of Backergunge* 73

REVOCABLE AGREEMENT. See Construction. 1.

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ADVERSE POSSESSION. See Limitation Act. 1.

BIRT SHANKALLAPS. Sects. 1 and 24 of a Circular Order of 1861, which enact in effect that if a birteeah is out of possession in 1855 his claim cannot be recognised have been treated as enactments of limitation by the authorities in *Oudh* and to some extent by the Legislature itself; but whether rightly so or not, they have in effect been repealed by Acts XVI. of 1865 and XIII. of 1866.

The Circular Order applied to all birt tenures, including shankallaps, so far as the latter are in the nature of birts.

The effect of sects. 1 and 2 of Act XXVI. of 1866 discussed. *Sir Maharajah Drig Bijai Singh* v. *Gopal Datt Panday* 17

CEREMONIES. See Hindu Law.

CIRCULAR ORDER, 1861, ss. 1, 24. See Birt Shankallaps.

CONSTRUCTION OF SUNNUD. See Impartible Raj.

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EVIDENCE OF AUTHORITY. See Limitation.

HINDU LAW. Amongst Sudras in *Bengal* no ceremonies are necessary in addition to the giving and taking a child in adoption. *Indromoni Chowdhrani* v. *Behari Lal Mullick* 24

IMPARTIBLE RAJ. Prior to 1802 the zemindary in suit formed part of an ancient and much larger estate, which was indivisible and descendible to a single heir, and which, prior to the British rule, was a military jaghire held on the tenure of military service, and in the nature of a raj or principality. The whole estate was resumed by the British Government for arrears of revenue.

In 1802 the said zemindary was granted to *R.* by a sunnud the provisions of which differed in no respect from those which are contained in every ordinary deed of permanent settlement; the feudal or

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military tenure was at an end. The zemindary so granted became a new zemindary, subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon zemindars.

By clause 7 it was said, "You shall be at free liberty to transfer, without the previous consent of Government or of any other authority, to whomsoever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole or in any part of your zemindary."

By clause 15 it was said, "You are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns at the permanent assessment herein named the zemindary":—

Held, that, upon the true construction of the sunnud, the zemindary thereby created was not impartible or descendible otherwise than according to the ordinary rule of Hindu law.

The *Hunsapore Case* (12 Moore's Ind. Ap. Ca. 6) distinguished; in which the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. *Rajah Venkata Narasimha Appa Row Bahadur* v. *Rajah Narayya Appa Row Bahadur*. *Rajah Venkata Narasimha Appa Row* v. *The Court of Wards* 38

INDIAN EVIDENCE ACT, 1872, ss 35, 48. Wajibularz or village papers made in pursuance of Regulation VII. of 1822, regularly entered and kept in the office of the Collector, and authenticated by the signatures of the officers who made them are admissible in evidence under the *Indian Evidence Act*, 1872, s. 35, in order to prove a family custom of inheritance stated therein; or under sect. 48, as the record of opinions as to the existence of such custom by persons likely to know of it. Such records are not invalidated in *Oudh*, because made and kept by the settlement officer or by officers subordinate to him; and not by the Collector as required by the Regulation. *Rani Lekraj Kuar* v. *Baboo Mahpal Singh*. *Rani Rughubuns Kuar* v. *Baboo Mahpal Singh* 63

INHERITANCE. See Impartible Raj.

IZAFATI. See Landed Tenure.

LANDED TENURE. In a suit to recover three-fourths share of the proceeds of certain teak and izaili timber alleged to have been cut down by the Government in the village of *P.*, the Plaintiff claiming that he had acquired his share of the village as proprietor thereof, and that the same was his waitani (hereditary) khoti and izafati (village); it appeared that the Plaintiff was the grantee of an hereditary right to receive as collector of the revenue certain perquisites out of the dues and certain cesses, and had agreed to preserve the said timber for the Government:—

Held, that the Plaintiff had no proprietary right in the soil, either as regards his izafati rights, or by virtue of his khoti, and no right to the timber.

The proprietorship of the soil is not vested in every khot. *Nagardhas Saubhagyyadas* v. *Conservator of Forests and the Sub-Collector of Kolaba* 55

1. LIMITATION ACT IX. OF 1871, SCH. 2, ART. 145. According to the provisions of art. 145 of Act IX. of 1871, schedule 2, the time from which the period of twelve years is to be calculated is that when the possession of the Defendant or some person through whom he claims becomes adverse to the Plaintiff.

Case in which, although the lands in suit were technically in the

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possession of the Defendant's predecessor, the period of limitation was *held* not to run until the Plaintiff was under some necessity or duty to assert his rights. *Dewar Manwar Ali* v. *Unnoda Pershad Roy* .. 1

2. LIMITATION ACT IX. OF 1871, s. 20. *Held*, upon the evidence in this case, that an acknowledgment of the debt sued for had not been signed by an agent of the Defendant generally or specially authorized in that behalf within the meaning of Act IX. of 1871, sect. 20.

Whatever general authority such agent may once have had from the Defendant it had ceased within the knowledge of the Plaintiff at the time of the signature. Special authority in that behalf cannot be proved by secondary evidence of the contents of a letter the non-production of which is not satisfactorily accounted for.

It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist they shall be produced as being the best evidence of their own contents. *Dinomoyi Debi* v. *Roy Luchmiput Singh* .. 8

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REGULATION XXXIV. OF 1803, ss. 9, 10. A stipulation in a mortgage (governed by the usury laws) by which the mortgagee relieves himself from the statutory obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV. of 1803, is valid so long as it appears that such stipulation is not a device for giving to the mortgagee a higher rate of interest than that to which he is by law entitled. *Badri Parshad* v. *Babu Murlidhur* 51

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ACCOUNTS: *See* REGULATION XXXIV. OF 1803, ss. 9, 10.

ACKNOWLEDGMENT BY DEFENDANT'S AGENT: *See* LIMITATION. 2.

ACT VIII. OF 1859, s. 5.] The Defendant being one of the proprietors of the fort and residence at *B.*, in the district of *Meerut*, where an establishment of some kind was kept, occasionally resided there for periods of time more or less considerable. The will of the testator (his father) under which he derived title, contemplated that the said fort and residence might be the principal place of residence of the testator's family, in which his family memorials should be preserved. It appeared that the Defendant also had a private house at *M.*, in the district of *Saharanpur*, in which he was actually, though temporarily, residing at the time the suit was brought:—*Held*, that the Defendant "dwelt" at *B.* within the meaning of sect. 5 of Act VIII. of 1859, and was therefore subject to the jurisdiction of the Court at *Meerut*. ORDE AND SKINNER *v.* SKINNER - - - 196

ACT VIII. OF 1859, ss. 239, 240: *See* ALIENATION OF PROPERTY UNDER ATTACHMENT.

ACT IX. OF 1871, s. 27.] In a suit to establish the Plaintiff's right to a pyne or artificial watercourse, and also to a tal or reservoir, and the water flowing from them through the Defendants' estate to his own, and to obtain the removal of certain obstructions, it appeared that the pyne was constructed by the Plaintiff's ancestors at a distant period of time, with compensation to the Defendants, and that the Plaintiff and his ancestors had had peaceable and continuous use for more than twenty years of the water flowing through it and to the overflow water of the tal, after the Defendants had used the water for the purpose of irrigating their said estate, and that all the said obstructions were unauthorized; but it was contended that the Plaintiff's right to recover in respect of them was barred by the *Statute of Limitations*:—*Held*, that a grant or some other legal origin of the Plaintiff's right must be presumed, and that Act IX. of 1871, being a remedial statute, did not exclude or interfere with titles and modes of acquiring easements existing independently of the Act; and in particular with those existing independently of sect. 27 of that Act, under which a statutory title could not accrue to the Plaintiff unless a period of twenty years' enjoyment terminating within two years of suit were shewn.—*Held*, further, that assuming the obstruction to have existed more than two years from the date of suit they were continuing nuisances as to which the cause of action accrued *de die in diem*, and was not barred by Act IX. of 1871, 2nd Schedule, Part V. Art. 34. MAHARANI RAJROOP KOER *v* SYED ABUL HOSSEIN - - 240

—— *See* LIMITATION.

ACT XIII. OF 1866: *See* BIRT SHANKALLAPS.

ACT XIV. OF 1859, s. 20: *See* LIMITATION.

ACT XVI. OF 1865: *See* BIRT SHANKALLAPS.

ACT XXVI. OF 1866, ss. 1, 2: *See* BIRT SHANKALLAPS.

ACTUAL DELIVERY OF THE CHILD: *See* HINDU LAW.

ADMISSIBILITY: *See* INDIAN EVIDENCE ACT.

ADOPTION: *See* HINDU LAW.

ADVERSE POSSESSION: *See* LIMITATION ACT. 1.

ALIENATION OF UNDIVIDED SHARE CANNOT BE BY WILL: *See* MITAKSHARA LAW.

ALIENATION OF PROPERTY UNDER ATTACHMENT.] Any alienation of property subject to a valid and subsisting attachment is null and void as against the attaching creditors and those deriving title under them; unless such alienation can be shewn not to fall within sect. 240 of Act VIII. of 1859.—An objection that the formalities prescribed by sect. 239 and contemplated by sect. 240 have not been duly observed must be taken in the Court below, and cannot be raised for the first time before their Lordships; and, *quære*, whether it is not for the Plaintiff claiming adversely to a Defendant in possession to prove the non-performance of such formalities. RAM KRISHNA DAS SURROWJI *v.* SURFUNNISSA BEGUM - - 157

BIRT SHANKALLAPS. Sects. 1 and 24 of a Circular Order of 1861, which enact in effect that if a birteeah is out of possession in 1855 his claim cannot be recognised have been treated as enactments of limitation by the authorities in *Oudh*, and to some extent by the Legislature itself; but whether rightly so or not, they have in effect been repealed by Acts XVI. of 1865 and XIII. of 1866. —The Circular Order applied to all birt tenures, including shankallaps, so far as the latter are in the nature of birts.—The effect of sects. 1 and 2 of Act XXVI. of 1866 discussed. SIR MAHARAJAH DRIG BNAI SINGH *v.* GOPAL DATT PANDAY 17

CEREMONIES: *See* HINDU LAW.

CHASTITY: *See* HINDU LAW.

CIRCULAR ORDER, 1861, ss. 1, 24: *See* BIRT SHANKALLAPS.

CONSTRUCTION.] The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.—Where on the true construction of the operative part of a mortgage

CONSTRUCTION—*continued.*

instrument it appeared that the same was intended to cover the general balance that might become due by the mortgagors to the mortgagee in the course of their business transactions:—*Held*, that the security could not be limited by the recital to such portion only of the general debt as consisted of advances made upon contracts for future delivery of produce, where the words of the recital were not necessarily repugnant to such construction. — Where by an agreement between debtor and creditor prescribing some of the terms on which their future dealings should be carried on, it was provided that an agreed balance should be liquidated by "returns only" made upon future contracts, but the agreement fixed no time for its duration or for such liquidation, or for the extent of business to be done, the result being that if either party were disposed to act unreasonably he would have the means of postponing the liquidation of such balance indefinitely:—*Held*, that such agreement was revocable. It could not be implied from the terms of the agreement that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until such agreed balance should be liquidated in the manner thereby provided. The parties having abstained from inserting express provisions for the fair and reasonable working of their supposed agreement, the Court would not supply them. PALLIKELAGATHA MARCAR *v.* JOHN GOTHFRIED SIGG - - 83

2. —— In a lease of fifty-one beegahs of land, from the terms whereof it appeared that the lessee's object in taking the said beegahs was that he might quarry therein, erect a factory and carry on mining operations, the lessors covenanted as follows:—"Within that aforesaid mouzah we will not give a pottah, let give settlement to anybody. If you take possession according to your requirements of extra land over and above this pottah, and we shall settle any such lands with you at a proper rate."—*Held*, that according to the true construction of this covenant it related only to such additional land as the lessee or his assigns might require for the purpose of carrying out the object for which the lease was granted.—*Quære*, whether the lessee could assign the covenant, and whether the purchasers of the adjoining land from the lessors with notice thereof, would be bound thereby. NEW BIRBHOOM COAL COMPANY *v.* BOLORAM MAHATA - - - 107

CONSTRUCTION OF SUNNUD: *See* IMPARTIBLE RAJ.

CUSTOM: *See* INDIAN EVIDENCE ACT.

DESAI.] Deshgat watan, or property held as appertaining to the office of desai, is not to be assumed *primâ facie* to be impartible. The burden of proving impartibility lies upon the desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies.—A decree for partition of such property should be without prejudice to the desai's right to such emoluments or allowances for the performance of the duties of the desaiship as he may be entitled to under any law in force. ADRISHAPPA BIN GADGIAPPA *v.* GURUSHIDAPPA BIN GADGIAPPA - - 162

DESHGAT WATAN: *See* DESAI.

"DWELT": *See* ACT VIII. OF 1859.

EASEMENT: *See* ACT IX. OF 1871, S. 27.

FATHER UNABLE TO MAKE AN UNEQUAL DISTRIBUTION OF ANCESTRAL PROPERTY: *See* MITAKSHARA LAW.

FORFEITURE OF DECEASED HUSBAND'S ESTATE: *See* HINDU LAW.

HERITABLE RIGHT OF WIDOW OF COLLATERAL RELATION OF THE DECEASED: *See* HINDU LAW OF WESTERN INDIA.

HINDU ADOPTION.] Where a Hindu adopted a boy without authority from her husband, and the consent of the sapinda had been obtained to an adoption purporting to be made in pursuance of an alleged authority, and had been influenced by undue considerations:—*Held*, that such adoption was invalid. KARUNABDHI GANESA RATNAMAIYAR *v.* GOPALA RATNAMAI AND RANGAIYAR [173

HINDU LAW.] Amongst Sudras in *Bengal* no ceremonies are necessary in addition to the giving and taking a child in adoption. INDROMONI CHOWDHRANI *v.* BAHARI LAL MULLICK - 173

2. —— Under the Hindu law, as administered in the *Bengal* school, a widow who has once inherited the estate of a deceased husband is not liable to forfeit that estate by reason of unchastity. MONIRAM KOLITA *v.* KERRY KOLITANY - 115

3. —— Although amongst Sudras, no ceremonies are necessary in addition to the giving and taking of a child in adoption; yet it must not be inferred therefrom that there can be such a giving and taking as is necessary to satisfy the law, even amongst Sudras, by mere deed, without an actual delivery of the child by the father.—But *held*, in this case, that on the evidence certain deeds of gift and acceptance of a child, duly executed and immediately registered, had not been intended by the parties as a complete adoption; the terms of the deeds themselves not being necessarily inconsistent with such finding. MAHASHOYA SHOSIMATH GHOSE *v.* SRIMATI KRISHNA SOONDARI DASI 250

HINDU LAW OF WESTERN INDIA.] The Hindu law of inheritance, as it has actually prevailed in *Western India*, recognises and affirms the right of a widow to inherit as a gotraja-sapinda to members of her husband's family; and there is no sufficient reason for holding that the doctrine to that effect which has so prevailed should not have the force of law. By that law the preferential right to inherit in the classes of sapindas is to be determined by family relationship, or the community of corporal particles, and not alone by the capacity of performing funeral rites:—*Held*, in this case, that by that law the widow of a paternal first cousin of the deceased became by her marriage a gotraja-sapinda of the deceased, and is entitled to succeed to the estate in preference to male gotraja-sapindas who are seventh in descent from the common ancestor of them and the deceased, which common ancestor is sixth in ascent from the deceased. LULLOOBHOY BAPPOOBHOY CASSIDASS MOOLCHUND *v.* CASSIBAI - - 212

HINDU WIDOW: *See* HINDU LAW.

IMPARTIBLE RAJ.] Prior to 1802 the zemindary in suit formed part of an ancient and much larger estate, which was indivisible and descendible to a single heir, and which, prior to the British rule, was a military jaghire held on the tenure of military service, and in the nature of a raj or principality. The whole estate was resumed by the British Government for arrears of revenue.—In 1802 the said zemindary was granted to *R.* by a sunnud the provisions of which differed in no respect from those which are contained in every ordinary deed of permanent settlement; the feudal or military tenure was at an end. The zemindary so granted became a new zemindary, subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon zemindars.—By clause 7 it was said, "You shall be at free liberty to transfer, without the previous consent of Government or of any other authority, to whomsoever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole or in any part of your zemindary."—By clause 15 it was said, "You are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns at the permanent assessment herein named the zemindary":—*Held*, that, upon the true construction of the sunnud, the zemindary thereby created was not impartible or descendible otherwise than according to the ordinary rule of Hindu law.—The *Hunsapore Case* (12 Moore's Ind. Ap. Ca. 6) distinguished; in which the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. RAJAH VENKATA NARASIMHA APPA ROW BAHADUR *v.* RAJAH NARAYYA APPA ROW BAHADUR. RAJAH VENKATA NARASIMHA APPA ROW *v.* THE COURT OF WARDS - - - 38

INDIAN EVIDENCE ACT, 1872, ss. 35, 48.] Wajibularz or village papers made in pursuance of Regulation VII. of 1822, regularly entered and kept in the office of the Collector, and authenticated by the signatures of the officers who made them are admissible in evidence under the *Indian Evidence Act*, 1872, s. 35, in order to prove a family custom of inheritance stated therein; or under sect. 48, as the record of opinions as to the existence of such custom by persons likely to know of it. Such records are not invalidated in *Oudh*, because made and kept by the settlement officer or by officers subordinate to him; and not by the Collector as required by the Regulation. RANI LEKRAJ KUAR *v.* BABOO MAHPAL SINGH RANI RUGHUBUNS KUAR *v.* BABOO MAHPAL SINGH [63

INHERITANCE: *See* IMPARTIBLE RAJ.

IZAFATA: *See* LANDED TENURE.

JURISDICTION: *See* ACT VIII. OF 1859.

JURISDICTION OF THE COURT ENFORCING DECREE: *See* LIMITATION.

LANDED TENURE.] In a suit to recover three-fourths share of the proceeds of certain teak and izaili timber alleged to have been cut down by the Government in the village of *P.*, the Plaintiff claiming that he had acquired his share of the village as proprietor thereof, and that the same was his waitani (hereditary) khoti and izafati (village); it appeared that the Plaintiff was the grantee of an hereditary right to receive as collector of the revenue certain perquisites out of the dues, and certain cesses, and had agreed to preserve the said timber for the Government:—*Held*, that the Plaintiff had no proprietary right in the soil, either as regards his izafati rights, or by virtue of his khoti, and no right to the timber. The proprietorship of the soil is not vested in every khot. NAGARDHAS SAUBHAGYADAS *v.* CONSERVATOR OF FORESTS AND THE SUB-COLLECTOR OF KOLABA - - - - - - 55

LIMITATION ACT IX. OF 1871, Sch. 2, Art. 145.] According to the provisions of art. 145 of Act IX. of 1871, schedule 2, the time from which the period of twelve years is to be calculated, is that when the possession of the Defendant or some person through whom he claims becomes adverse to the Plaintiff. Case in which, although the lands in suit were technically in the possession of the Defendant's predecessor, the period of limitation was *held* not to run until the Plaintiff was under some necessity or duty to assert his rights. DEWAN MANWAR ALI *v.* UNNODA PERSHAD ROY 1

2. ——— s. 20.] *Held*, upon the evidence in this case, that an acknowledgment of the debt sued for had not been signed by an agent of the Defendant generally, or specially authorized in that behalf within the meaning of Act IX. of 1871, sect. 20. Whatever general authority such agent may once have had from the Defendant it had ceased within the knowledge of the Plaintiff at the time of the signature. Special authority in that behalf cannot be proved by secondary evidence of the contents of a letter the non-production of which is not satisfactorily accounted for. It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist they shall be produced as being the best evidence of their own contents. DINOMOYI DEBI *v.* ROY LUCHMIPUT SINGH - - - - - 8

LIMITATION.] A proceeding to enforce a decree, taken *bonâ fide* and with due diligence before a Judge whom the party, *bonâ fide* though erroneously believes to have jurisdiction, is a proceeding within the meaning of sect. 20, Act XIV. of 1859; whether the Judge actually decides that he has jurisdiction, or supposing himself to have jurisdiction acts accordingly. *Roy Dhunput Sing* v. *Madhomattee Dabia*. (11 Beng. L. R. 23) commented upon. HIRA LALL *v.* BUDRI DASS - - 167

See BIRT SHANKALLAP.

See ACT IX. OF 1871, s. 27.

See MITAKSHARA LAW.

MITAKSHARA LAW.] Under the Mitakshara law as received in *Bombay*, a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons.—Although one of several coparceners has under the same law the power of alienating his undivided share in ancestral estate without the consent of his co-sharers by deed

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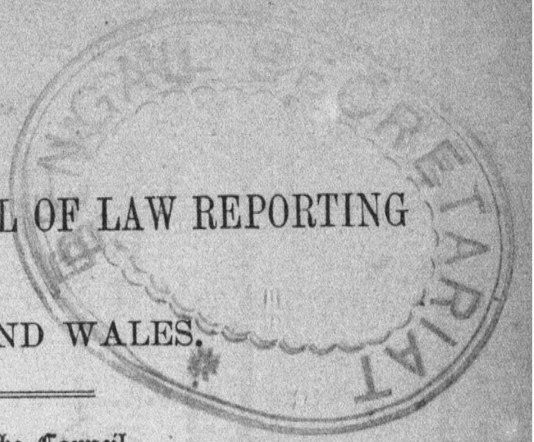

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